

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ZOILA IGLESIAS, individually and as next friend
J.R. and K.R. infants,

Plaintiffs,

08 Civ. 1595 (AKH)

-against-

JOHN MATTINGLY, et al.,

Defendants.
-----X

**DECLARATION OF
PLAINTIFF IN OPPOSITION
TO THE MOTION TO DISMISS**

ZOILA IGLESIAS, hereby declares under penalty of perjury that the following is true and correct:

1. I am the adult plaintiff in the above-entitled action, and I reside at 45 Jackson Street, New York, New York.
2. I make this declaration in opposition to the motion to dismiss of defendant Gladys Carrion.
3. I have five children, and I raised them from the time they were born until they became adults.
4. The children have given me wonderful grandchildren.
5. I have never been accused of abusing, neglecting, or otherwise mistreating my children.
6. For many years, I have cared for four of my grandchildren, and I have always provided loving care to my grandchildren.
My oldest grandson, R.R.
7. R.R. is my oldest grandson. He was born on October 28, 1994, and is now

13 years old.

8. In 1998, when R.R. was four years old, my son and his girlfriend asked me to take custody of R.R., because they were unable to care for him.

9. I agreed, and I began taking care of R.R. Also, I went to court to get a court order giving me legal custody of R.R.

10. R.R. has been with my, in my custody, for the past ten years.

My youngest grandson, A.Q.

11. A.Q. was born on August 28, 2004, and is the son of my second son. He has lived with me for his entire life. I have had legal custody of A.Q. since he was born.

12. He is the brother of K.R. and J.R., and the first cousin of R.R.

My granddaughter K.R.

13. K.R. is the older sister of A.Q. She was born on December 26, 2001.

14. When K.R. was little, I saw her often. I frequently baby-sat for her.

15. We had a very good relationship, and K.R. loved her cousin R.R., who was living with me.

16. When K.R. was barely three years old, her father (my oldest son) and her mother became unable to care for her.

17. An ACS caseworker, Mr. Omaludun, asked me if I would be willing to take care of K.R. Naturally, I agreed.

18. K.R. came to live with me on January 20, 2005.

19. Nobody told me that I could choose whether to take legal custody of K.R. or to care for K.R. as a foster child. Instead, Mr. Omaludun said that I would be K.R.'s foster

mother. The decision had already been made by somebody else.

20. After K.R. came to live with me, Ms. Vargas, a supervisor at the foster care agency Coalition for Hispanic Family Services ("Coalition"), asked me to sign some papers. The Coalition then gave me a license to be K.R.'s foster mother.

21. I always treated K.R. the same as I treated my other grandchildren. I gave them all a lot of love, and I treated them all equally. In my mind, there was no difference. The fact that K.R. was officially my foster child and R.R. and A.Q. were in my legal custody did not make any difference to me. I loved them all equally, and I took care of them all equally.

My middle grandson, J.R.

22. J.R., born December 7, 2002, is the older brother of A.Q. and K.R.

23. In April, 2005, J.R.'s father (my son) asked me to watch J.R., who was just over two years old at the time. I agreed.

24. My son never returned to pick J.R. up.

25. About 48 hours after J.R.'s father disappeared, I called Lianne Clarke Parris and Ms. Vargas at the Coalition, and told them that J.R. had come to live with me.

26. Ms. Parris told me that I should keep J.R. She said that I should not send him back to his birth parents because they were unable to care for him.

27. Some days later, Ms. Parris told me that ACS had gone to court and had gotten legal custody of J.R. She said that I would be J.R.'s foster parent. She did not tell me that I had any option to get an order of custody for J.R.

28. Sometime after that, I received papers saying I was J.R.'s foster mother.

29. I have cared for my four grandchildren as my own children. I have

provided for all of their needs, and have given them a lot of love. The children love me, as I love them.

The removal of the children

30. On February 6, 2008, while my youngest son was visiting me, the police came to arrest him. For reasons which I do not understand, the police arrested me, too.

31. The police took me, my son, and my grandchildren to the precinct house of the Seventh Precinct in Manhattan. After holding me for several hours, the police released me. No one ever filed any charges against me in the criminal court or any other court.

32. When the police released me, I tried to get my grandchildren back. The police told me that ACS had taken my children, and I would have to contact ACS.

33. ACS refused to return the children to me.

34. The next day, on February 7, 2008, ACS filed child neglect charges in the Family Court, claiming that I had neglect two of my grandchildren, R.R. and A.Q. ACS did not charge me with neglecting J.R. or K.R.

35. On February 7, 2008, after a trial, where I testified and Helen Colon testified, and other evidence was presented, the Family Court judge ordered ACS to return R.R. and A.Q. to me. The Family Court judge said that she couldn't do anything about J.R. and K.R. because they weren't part of that court case.

36. On February 13, 2008, a Family Court judge in Brooklyn ordered the defendants to return K.R. to me. The Family Court judge did not make any orders regarding J.R. because he said that he did not have jurisdiction over J.R., who has a case in Queens.

37. I did not see J.R. or K.R. from February 6, 2008, until February 15, 2008.

J.R. and K.R. were placed in two separate foster homes.

Return of the children

38. Finally, around 5 pm on February 15, 2008, Lianne Clark Parris returned J.R. and K.R. to me.

39. When the children returned, they had changed emotionally. J.R. didn't say a word until the next day. He did not want to leave my side, not even for a short time. Even now, J.R. is afraid whenever he sees a police officer. He doesn't like to speak to strangers. He is very active and nervous, and is afraid that someone is going to come and take him away again.

40. K.R. was extremely afraid for several days after she returned to me. She didn't want to sleep by herself. She was very clingy towards me.

41. A.Q. was also very clingy after his return. He was also extremely hungry. A.Q. was very afraid of the police, and he mentioned the police fearfully all of the time.

42. R.R. was also very nervous for the first few days. He didn't want to stay by himself. He was especially loving and caring towards me, showing that he was afraid of being taken away again.

I declare under penalty of perjury that the foregoing is true and correct. Signed on June 9, 2008.


ZOILA IGLESIAS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ZOILA IGLESIAS, individually and as next friend
J.R. and K.R. infants,

Plaintiffs,

08 Civ. 1595 (AKH)

-against-

JOHN MATTINGLY, et al.,

**DECLARATION
IN OPPOSITION TO THE
MOTION TO DISMISS**

Defendants.
-----X

CAROLYN A. KUBITSCHEK, hereby declares under penalty of perjury that the following is true and correct:

1. I am a member of the firm of Lansner & Kubitschek, attorneys for plaintiffs in the above-entitled action, and am fully familiar with the facts of this matter.
2. I make this declaration in opposition to the motion of defendant Carrión to dismiss the case against her.

“Kinship” foster care

3. As of March, 2008, the City of New York had 16, 982 children in foster care. http://www.nyc.gov/html/acs/downloads/pdf/stats_monthly_update.pdf , (ACS Monthly Updated, page 2.) Those children are in the legal custody of the City’s Commissioner of the Administration for Children’s Services (“ACS”), the City’s child welfare department.
4. As of March, 2008, 4,952 children in foster care were living with relatives who are serving as foster parents to the children, i.e., 29.16 percent of New York City’s foster care population. (*Id.*)
5. New York City has long recognized the importance of placing its foster

children in homes with their blood relatives. (*See* Exhibit 1, Memorandum of Commissioner Scoppetta, dated February 8, 2001.)

6. Accordingly, the City recommends that its ACS employees actively search for relatives who are willing to care for the City's foster children. (*Id.*)

7. The City's positive experience with kinship foster care has been confirmed in a recent study by David M. Rubin, M.D., in the Archives of Pediatric Adolescent Medicine. (*See* Exhibit 2, annexed hereto.) Dr. Rubin found that children in kinship care do better than children whose foster parents are biological strangers to them.

8. In addition, the Center on Law and Social Policy has found that children in kinship care fare better than those with strangers. (*See* Exhibit 3, annexed hereto.)

Zoila Iglesias

9. Plaintiff Zoila Iglesias first contacted the law firm of Lansner & Kubitschek on February 8, 2008. The New York City Administration for Children's Services ("ACS") had taken her four grandchildren away from her on February 5, 2008. ACS had filed child neglect charges in the New York Family Court against her on February 7, 2008. ACS alleged that she had neglected her grandsons R.R. and A.Q. ACS did not file any charges whatsoever with regard to the infant plaintiffs J.R. and K.R. (A copy of the neglect petitions are attached as Exhibits 4 and 5. The petitions are identical except for the names of the children.)

10. The sole allegation against Ms. Iglesias was that she failed to provide adequate supervision of her grandchildren because she "knew or should have known that" her 20-year-old son Anubis Rivas "fails to provide the subject children with adequate supervision and guardianship and misuses a drug or drugs . . . which is [*sic*] impairs his ability to care for the

subject children.” (See Exhibits 4 and 5, “Addendum I, ¶3).

11. The allegations were false. First, Ms. Iglesias has never permitted her 20-year-old son, who does not reside with her, to care for her children. On the rare occasions that Ms. Iglesias’ son comes to her home, he is her guest, not her baby-sitter.

12. When ACS filed the charges, it asked the Family Court judge to issue an order permitting the City to continue detaining R.R. and A.Q., pursuant to N.Y. Fam. Ct. Act §1027. The judge held an immediate trial on the issue. At the conclusion of the trial, the Family Court judge found that R.R. and A.Q. would not be in imminent danger if they were returned to Ms. Iglesias. Accordingly, the judge ordered the City to return R.R. and A.Q. to Ms. Iglesias forthwith. (A copy of the order returning the children are attached as Exhibit 6.)

13. When the attorney who represented Ms. Iglesias in Family Court asked for the return of J.R. and K.R., the Family Court judge stated that she did not have jurisdiction to issue any orders retarding those two children because those children were not before her.

14. The Family Court attorney referred Ms. Iglesias to Lansner & Kubitschek.

15. Upon meeting Ms. Iglesias for the first time, I learned that she had not received the 10-day notice which the law requires agencies to provide when they remove children from foster parents. (See Exhibit 7, ACS “Independent Review Protocol,” dated July 2, 2004, p. 95.)

16. I knew that a foster parent has a right to a conference, known as an “Independent Review,” followed by an administrative hearing.

17. I also knew, for reasons set out below, that following such a course is almost futile.

18. The process takes so long that both the kinship foster parent and foster children suffer irreparable injury, even if they are ultimately successful. Moreover, the regulations, policies, and practices of the New York State Commissioner of the Office of Children and Family Services, which govern the proceedings, are constitutionally deficient, making it highly unlikely that the kinship foster parents will ever succeed.

19. Accordingly, I telephoned the Legal Aid Society, which represented J.R. and K.R. in their own Family Court cases.

20. The Legal Aid Society agreed to make a motion, in J.R. and/or K.R.'s Family Court case, to seek the return of J.R. and K.R. to Ms. Iglesias.

21. As the former foster parent of the two grandchildren, Ms. Iglesias lacked standing to go to the Family Court on her own behalf and could not seek any relief whatsoever in that venue.

22. On February 13, 2008, the Legal Aid Society filed a motion by order to show cause in K. R.'s case, and obtained an order directing the return of K. R. to Ms. Iglesias within 24 hours, i.e., by 11:00 AM on February 14, 2008. (*See Exhibit 8, attached.*) As stated above, Ms. Iglesias lacked standing to seek or receive such an order on her own.

23. Defendants failed to comply with the order.

24. Accordingly, late in the afternoon of February 15, 2008, Ms. Iglesias commenced the instant action and sought a temporary restraining order in this Court, before Hon. Thomas P. Griesa, seeking immediate return of the foster children.

25. While counsel for the parties were arguing the application for a temporary restraining order, sometime after 5 p.m. on February 15, 2008, the defendants finally returned J.

R. and K.R. to Ms. Iglesias.

26. Accordingly, Ms. Iglesias withdrew the application.

27. It was only a matter of luck (and hard work on the part of K.R.'s Family Court attorney) that Ms. Iglesias succeeded in securing the return of infant plaintiffs J.R. and K.R. to her in a comparatively short time. Other kinship foster parents, those who have attempted to exhaust the few administrative remedies which state law provides, have not been as successful.

Kinship foster parent Alice Haynes

28. In the case of Haynes v. Mattingly, 06 Civ. 1383 (TPG), the Administration for Children's Services had removed Alice Haynes' 4-year-old grandniece, who was her kinship foster child, from Ms. Haynes, because of an allegation that Ms. Haynes' own daughter had a red mark on her face which might have been caused by abuse. (ACS never removed the daughter herself.)

29. Ms. Haynes had sought an Independent Review, which was held 21 days after the removal of her grandniece. Ms. Haynes lost, even though ACS determined that the red mark on her daughter's face was an allergic reaction to eating shrimp, and not child abuse.

30. Ms. Haynes next sought a "Fair Hearing" from defendant Carrión's predecessor. The fair hearing was not held until more than five months after the removal of the 4-year-old grandniece.

31. Eight months after the removal of the grandniece, defendant Carrión's predecessor finally ruled that the City had acted in an "arbitrary and capricious" manner in removing the grandniece from Ms. Haynes, and that the removal "was not a proper exercise of

discretion.”

32. Despite those findings, defendant Carrión’s predecessor did not order the City to return the grandniece to Ms. Haynes.

33. Ms. Haynes filed suit in this Court, and sought a preliminary injunction, ordering the City to return the grandniece to her, and arguing that the removal and detention of the grandniece were in violation of Rivera v. Marcus, 696 F.2d 1016 (2d Cir. 1982).

34. At oral argument, counsel for defendant Carrión’s predecessor asserted that the State Commissioner of the Office of Children and Family Services lacked the power to order the City to return a foster child to a foster parent after the City has removed the child. (See Exhibit 9, p. 8; Transcript, Haynes v. Mattingly, 06 Civ. 1383 (TPG), May 23, 2006, p. 16).

35. When the judge asked the State Commissioner what the purpose of a fair hearing was – since the foster parent could not succeed in obtaining the return of the foster child – counsel for the Commissioner stated that “when a child is removed from foster care, the foster parent is losing an income stream and the Section 400 hearing is a chance for a foster parent to try to convince the State that she should keep her job,” i.e., obtain a different foster child. (*Id.* at p. 8; Transcript, p. 17).

36. Because of a kinship foster parent’s inability to obtain due process of law, the judge in the Haynes case determined that the federal court would hold a hearing “as to the proper remedy for the violation of due process in the removal of the child” and “the relative benefit or detriment involved in having the child returned to Ms. Haynes. . . .”

37. A few days before the scheduled hearing, the City returned Ms. Haynes’ grandniece to Ms. Haynes. The child has been with Ms. Haynes since that time.

38. The case of Haynes v. Mattingly is pending, and discovery is in process.

Kinship foster parents Mabel and Anthony Rivera

39. In the case of Rivera v. Mattingly, 07 Civ. 7077 (TPG), the City had removed Mable and Anthony Rivera's five grandnieces from the Riveras, who were the kinship foster parents for all five, because the second oldest grandniece (who was 11), alleged that the boyfriend of Mrs. Rivera's adult daughter had had sexual relations with the oldest grandniece (who was 12), while the two grandnieces were visiting the home of Mrs. Rivera's adult daughter, at a time when Mrs. Rivera was out shopping and Mr. Rivera was caring for the three youngest grandnieces.

40. Shortly after making the charges, the two oldest grandnieces admitted that the charges were untrue. ACS did a complete investigation and also determined that the charges were untrue and that the Riveras were innocent of any wrongdoing.

41. Nevertheless, at the "Independent" Review, ACS upheld the decision to remove all five grandnieces.

42. The State Commissioner did not hold a fair hearing until four months after the removal of the children. After the hearing, the State Commissioner issued a decision that the removal of the children had been arbitrary and capricious. As in Alice Haynes' case, the State Commissioner declined to order the return of the grandnieces to Mr. and Mrs. Rivera.

43. Mr. and Mrs. Rivera filed suit in this Court, Rivera v. Mattingly, 06 Civ. 7077 (TPG), and sought a preliminary injunction directing defendants to return the three youngest grandnieces to the Riveras. (The two older grandnieces were in the process of returning to their mother.) The court initially denied the motion.

44. On December 4, 2006, the Court concluded that the government had deprived the Riveras and their grandnieces of due process of law in that they had had no meaningful opportunity to be heard. (See Exhibit 10, Rivera v. Mattingly, 06 Civ. 7077 (TPG), transcript, December 4, 2006, pp. 39-42.)

45. On December 11, 2006, nearly nine months after the removal, a judge of this Court ordered the return of one of the three grandnieces to Mr. and Mrs. Rivera. (See Exhibit 11, Rivera v. Mattingly, 06 Civ. 7077 (TPG), transcript December 11, 2006, p. 39).

46. On December 20, 2006, a judge of this Court ordered the return of the other two youngest grandnieces to Mr. and Mrs. Rivera. (By that time, the two oldest grandnieces had been reunited with their mother, and were no longer in foster care.) (See Exhibit 12, Rivera v. Mattingly, 06 Civ. 7077 (TPG), transcript December 20, 2006, p. 23.)

47. The case of Rivera v. Mattingly is pending, and discovery is in process.

48. Other cases challenging the removal of children from kinship foster parents are also pending in this District.

49. In addition, I have received inquiries from other a number of attorneys in the City of New York who are presently representing kinship foster parents whose foster children have been removed by ACS. Some of the children were subsequently returned. In other cases, the kinship foster parents still have not secured the return of the children.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Signed on June 10, 2008.


CAROLYN A. KUBITSCHEK

CS-1
Rev. 3/99



ADMINISTRATION FOR CHILDREN'S SERVICES
150 WILLIAM STREET - 18TH FLOOR
NEW YORK, N.Y. 10038

NICHOLAS SCOPPETTA
Commissioner

DATE: February 8, 2001

TO: Staff, ACS
Executive Directors, Contract Foster Care Agencies

FROM: Nicholas Scoppetta 

SUBJ: Procedure No.105/Bulletin No.01-1, *Certification/Approval of Foster Boarding Homes*

In order to implement the newly amended OCFS regulations (18 NYCRR 443) relating to the certification and approval of foster boarding homes, which were effective on September 27, 2000, ACS is issuing the attached Procedure/Bulletin which highlights the major changes from the earlier regulations, which contains additional ACS requirements established by local policy and which provides instructions for implementing the regulations and the policies.

ACS views the creation of the new foster boarding home licensing regulations as a tremendous opportunity to promote achievement of our reform objectives in relation to neighborhood-based services with continued emphasis on the value of kinship placements (in its new expanded definition) for children in our care. Key among these opportunities are:

- promoting more kinship placements with allowance for placement of large sibling groups together through less stringent physical space requirements, along with an exception process for approved homes;
- respecting a family's definition of "kinship" to include more distant relatives and non-relatives with significant family relationships, and allowing all "kinship" placements to be made on an emergency basis;
- granting of exceptions to non-safety related criteria for close kinship placements which, under the amended regulations, has been delegated to ACS;
- expediting permanency for a child by accepting a single foster parent/adoptive parent application, when appropriate, with a single homestudy serving both purposes.

(over)

While this Procedure/Bulletin stresses only those requirements that ACS believes are the most significant, agencies are required to follow *all* the regulations concerning certification and approval of foster boarding homes. Agency homefinders and any other staff who carry out emergency or full home studies or recertifications must familiarize themselves with the applicable regulations and ACS policies. Of particular importance are the following:

- new or additional time frames relating to completing particular tasks in the emergency and full home study processes. (See summary Chart on page 9.)
- the subject matter that must be covered in all orientation sessions (See pages 12 - 13.)
- the need for OCFS Regional Office approval of each agency's foster parent training program (MAPP training). Note that ACS has prepared a training plan (including orientation) and curriculum which it will be submitting to OCFS. Upon approval, ACS will share its plan/curriculum with all contract agencies and will provide for train-the-trainer opportunities. (Agencies that wish to establish their own training plans/curricula must secure individual approval from OCFS. Further information regarding foster parent orientation/training will be sent out under separate cover.)

For your convenience, attached to this Memorandum is a summary of the differences between the new regulations and the previous regulations. Also enclosed is a complete copy of 18 NYCRR 443, *Certification, Approval and Supervision of Foster Family Boarding Homes*.

This Procedure/Bulletin replaces ACS Procedure No. 98/Bulletin 96-2A, *Referrals and Supervision of Approved Relative Foster Homes*, 4/16/96, both of which are now declared obsolete.

ARTICLE

Impact of Kinship Care on Behavioral Well-being for Children in Out-of-Home Care

David M. Rubin, MD, MSCE; Kevin J. Downes, MD; Amanda L. R. O'Reilly, MPH;
Robin Mekonnen, MSW; Xianqun Luan, MS; Russell Localio, PhD

Objective: To examine the influence of kinship care on behavioral problems after 18 and 36 months in out-of-home care. Growth in placement of children with kin has occurred despite conflicting evidence regarding its benefits compared with foster care.

Design: Prospective cohort study.

Setting: National Survey of Child and Adolescent Well-Being, October 1999 to March 2004.

Participants: One thousand three hundred nine children entering out-of-home care following a maltreatment report.

Main Exposure: Kinship vs general foster care.

Main Outcome Measures: Predicted probabilities of behavioral problems derived from Child Behavior Checklist scores.

Results: Fifty percent of children started in kinship care and 17% of children who started in foster care later moved

to kinship care. Children in kinship care were at lower risk at baseline and less likely to have unstable placements than children in foster care. Controlling for a child's baseline risk, placement stability, and attempted reunification to birth family, the estimate of behavioral problems at 36 months was 32% (95% confidence interval, 25%-38%) if children in the cohort were assigned to early kinship care and 46% (95% confidence interval, 41%-52%) if children were assigned to foster care only ($P=.003$). Children who moved to kinship care after a significant time in foster care were more likely to have behavioral problems than children in kinship care from the outset.

Conclusions: Children placed into kinship care had fewer behavioral problems 3 years after placement than children who were placed into foster care. This finding supports efforts to maximize placement of children with willing and available kin when they enter out-of-home care.

Arch Pediatr Adolesc Med. 2008;162(6):550-556

Author Affiliations: Pediatric Generalist Research Group (Drs Rubin and Downes, and Mss O'Reilly and Mekonnen), Safe Place: The Center for Child Protection and Health (Dr Rubin and Mss O'Reilly and Mekonnen), and Divisions of General Pediatrics (Dr Rubin and Mss O'Reilly and Mekonnen) and Biostatistics (Mr Luan), Children's Hospital of Philadelphia and Departments of Pediatrics (Dr Rubin) and Biostatistics and Epidemiology (Dr Localio), University of Pennsylvania School of Medicine, Philadelphia

THE LAST 2 DECADES HAVE brought significant growth in the number of children being raised by relatives in kinship care across the United States. According to the 2005 census, more than 2.5 million children were living with a relative caregiver other than a birth parent, representing a 55% increase from census reports in 1990.¹ Although there are many circumstances in which a child may come to reside with kin, substantiated reports of child abuse or neglect might be the most common reason. In 2002, an estimated 542 000 children were living with kin following the involvement of a child welfare agency, exceeding the number of children living in non-relative foster care arrangements.² The growth in kinship care is the result of a sustained effort to improve permanency for children since the Adoption and Safe

Families Act of 1997.³ Since then, child welfare agencies have increased efforts to place children with kin despite scant and conflicting evidence of improved outcomes for children in kinship care compared with children in general foster care.

For editorial comment see page 586

A review of the literature delineates conflicting evidence regarding the benefits and trade-offs of raising children with kin. A large body of research acknowledges the evidence that children in kinship care are less likely to change placements, benefiting from increased placement stability, compared with children in general foster care.⁴⁻⁷ Placement stability is a common goal of child welfare systems and has consistently been shown to result in better outcomes for all

children living in out-of-home care.⁸⁻¹⁰ Children in kinship care are also more likely to remain in their same neighborhood, be placed with siblings, and have consistent contact with their birth parents than children in foster care, all of which might contribute to less disruptive transitions into out-of-home care.^{8-11,15}

Other evidence raises concerns of safety for children in kinship arrangements given the greater risk of continued and often unsupervised access to abusive parents and a greater likelihood that the child's new relative caregivers share similar problems as offending parents.¹²⁻¹⁶ Children in kinship care also have higher rates of behavioral and educational problems than other children living in poverty who are not involved with the child welfare system.^{11,17-18} Long-term outcome studies have also failed to demonstrate a significant difference between children raised by kin and foster parents.¹⁹⁻²⁰ And finally, children in kinship care are known to face additional hardships because their caregivers tend to be single, older, of poorer health, and of lower economic status; have more mental health problems; receive less assistance and services from child welfare agencies; and have fewer supportive resources than foster parents.²¹⁻²⁴

Given this conflicting evidence, there is a need to better understand the experiences and outcomes of children in kinship care compared with general foster care. The recent National Survey of Child and Adolescent Well-Being (NSCAW), mandated by Congress in 1996 and conducted for the Department of Health and Human Services, has provided a unique opportunity to capture the experiences and early outcomes of a nationally representative cohort of children placed in out-of-home care.²⁵ We therefore sought to estimate the association between placement into kinship care and the likelihood of behavioral problems after 18 and 36 months in out-of-home care.

METHODS

NSCAW was a complex survey that sought to recruit a nationally representative sample of American children following substantiated maltreatment reports to child protective services from October 1999 to December 2000. Interviews were conducted with children, caregivers, birth parents, child welfare workers, and teachers at baseline, 18 months, and 36 months after enrollment, with the completion of the 36-month follow-up occurring by March 2004. Of the original 5501 children enrolled in NSCAW, we restricted our sample to those children residing at home at the time of the initial investigation for maltreatment and who entered out-of-home care between the date of investigation and baseline data collection. We excluded subjects who spent more than 9 of the first 18 months in restrictive settings like group homes or residential treatment facilities because we were principally interested in the movement of children across the less restrictive settings of kinship and foster care.²⁶ The response rate at baseline for the NSCAW sample was 61% (5501 of 8961, weighted, 64%). However, our target population of children in out-of-home care was easier to recruit and therefore had a response rate approaching 88%.²⁷

The main exposures of interest were the placement setting, placement stability, and reunification status of the children. For placement setting, we divided children into 3 categories: (1)

early kinship care, if they had a placement in a kin home within 1 month of entry into out-of-home care, (2) if their placement with kin occurred beyond the first month of out-of-home care and (3) general foster care, if they had no subsequent placements into kinship care. For placement stability over the first 18 and 36 months in out-of-home care, we followed previous work²⁸⁻²⁹ and divided children into 3 distinct categories of stability: (1) early stable, in which a sustained placement or reunification was achieved within 45 days of entry into out-of-home care and lasted through the end of the study period (18 or 36 months); (2) late stable, in which a sustained placement or reunification was achieved after 45 days, with a duration of at least half the study period, and (3) unstable, in which no long-lasting placement or reunification was achieved during the study period. A separate reunification variable was created to identify those children for whom a reunification to the birth family was attempted.

The primary outcome for this study was the child's behavioral well-being at 18 and 36 months, as measured by the Child Behavior Checklist (CBCL).³⁰ Scores for each item from this caregiver-reported survey are summed into a total behavioral problems scale, which is normalized by age to identify categories of normal, borderline (>83rd percentile), and clinical (>90th percentile) range behaviors. For the purposes of our study, we dichotomized the outcome variable at the 83rd percentile to denote normal vs abnormal behavior scores, a practice which has been used commonly in prior studies with this instrument.^{21,28,31-35}

To encode a child's baseline risk, the major source of confounding in this study, we built on prior work using ordinal regression models to estimate the future risk of placement stability using baseline attributes of the children and their families.³⁶ Child-level factors for these models included sex, age (<2 years, 2-10 years, >10 years), race (white, black, or other), history of chronic health problems (yes/no), caregiver-reported mental health service use (yes/no), use of prescription medications (yes/no), and the child's behavioral well-being at baseline. The behavioral well-being variable was a composite variable using standardized CBCL scores for children 2 years and older and standardized temperament scores for younger children that were used in the National Longitudinal Survey of Youth.³⁷⁻³⁸ Birth parent characteristics included histories of drug or alcohol abuse (yes/no), mental health problems (yes/no), and domestic violence or arrests (yes/no). Child maltreatment variables included the type of maltreatment (physical abuse, sexual abuse, neglect/abandonment, other) and prior reporting/foster care history (yes/no).

Postestimation probabilities of placement stability from the ordinal logistic regression models were reduced into 3 tertiles to represent low-, medium-, or high-risk groups. These tertiles were then added to logistic regression models for the outcome of any behavioral problem at 18 and 36 months. The other variables in these analyses were the child's placement setting, placement stability, and reunification status over the interval (either 18 or 36 months).

For the 18-month model, 392 children were younger than 2 years and just missed the cutoff for the CBCL. We used multiple imputation, with 5 imputed values per missing observation, to estimate the missing 18-month CBCL data³⁹ using 36-month CBCL scores, the caregiver's report of mental health service use by children between baseline and 18 months, and all other independent variables that were ultimately included in the final models. A similar approach permitted the imputation of CBCL scores for 159 children at 36 months whose CBCL scores were unmeasured.⁴⁰

After fitting the final models, we estimated predictive margins for the probability of behavior problems had all children been assigned to kinship or general foster care.⁴¹ These posi-

Table 1. Characteristics of Children Entering Out-of-Home Care Within NSCAW^{a,b}

Characteristic	Initial Placement Setting, No. (%)		P Value
	Foster Care (50.3%) (n=710)	Kinship Care (49.7%) (n=599)	
Demographics			
Child's age, y			
<2	29.8 (304)	26.0 (230)	.12
2-10	45.7 (260)	54.6 (269)	
>10	24.5 (145)	19.4 (100)	
Child's sex			
F	52.0 (354)	55.9 (333)	.42
M	48.0 (356)	44.2 (266)	
Child's race			
White	52.1 (318)	47.9 (259)	.37
Black	35.0 (265)	41.2 (268)	
Other	12.8 (107)	10.9 (72)	
Hispanic ethnicity	13.7 (103)	12.9 (108)	.76
Below poverty level ^b	23.0 (129)	44.0 (228)	<.001
Child baseline health			
Abnormal behavior ^c	42.1 (249)	32.8 (179)	.04
Health problems	46.5 (354)	42.1 (262)	.34
Prescription medication use	3.2 (19)	0.6 (7)	.005
Mental health service use	35.4 (228)	24.3 (137)	.003
Maltreatment history			
Type of abuse reported			
Neglect/abandonment	56.0 (392)	58.6 (314)	.90
Physical abuse	18.6 (112)	18.6 (106)	
Sexual abuse	9.5 (73)	8.8 (50)	
Other	15.8 (72)	13.9 (76)	.06
Prior child protective services involvement	69.2 (478)	61.9 (358)	
Birth parent characteristics			
Mental health problems	58.4 (414)	46.6 (290)	.006
Domestic violence or incarceration	50.7 (354)	52.6 (306)	.59
Substance abuse	45.3 (365)	47.9 (311)	.54
Behavioral outcomes			
Abnormal 18-mo CBCL ^d scores ^d	47.1 (214)	31.4 (169)	.001
Abnormal 36-mo CBCL scores ^d	48.0 (250)	29.1 (173)	<.001

Abbreviations: CBCL, Child Behavior Checklist; NSCAW, National Survey of Child and Adolescent Well-being.

^a Percentages are based on survey weights (n=sample size, unweighted).

^b For child's initial placement setting in out-of-home care. The poverty level is defined as household income less than \$20,000 for a family of 5 (median household size in NSCAW out-of-home sample = 5) and the weighted average poverty threshold for a household of 5 in 1999 was \$20,127.⁴³

^c Defined as more than 1 SD from the mean using standardized infant temperament score if child is younger than 2 years or the CBCL score if the child is 2 years or older.

^d Numbers and percentages presented in the table are based on nonimputed data. Estimates based on imputed data are as follows: abnormal 18-month CBCL scores: foster care (44.7%) and kinship care (29.8%); abnormal 36-month CBCL scores: foster care (46.4%) and kinship care (29.0%).

estimation methods allowed for standardized comparisons of outcomes across different classifications of children. Estimates report the probability of behavioral problems if all children in the sample shared the same experience while averaging over other covariates in the model. Reporting adjusted probabilities of behavioral outcomes was preferred to reporting risk ratios because the prevalence of behavioral problems was high in the population.

All variance estimates accounted for the stratification, clustering, and sampling weights in NSCAW. The extreme variability in weights (range, 1-6908) led us to mirror prior analyses and trim the design weights higher than the 95th percentile.⁴⁴ Separate analyses revealed that trimming weights in this manner reduced the variance of estimates without significantly affecting point estimates. In addition, variance estimates reflect the variability of using imputed data. Variances for the predictive margins within the imputed data set were estimated using bootstrap resampling at the primary sampling unit level (999 samples). Within- and among-imputation components of variance were then combined to form the final confidence intervals (CIs) for these marginally standardized probabilities.⁴⁵ Sensitivity analyses (not shown) comparing multiple imputation vs excluding the younger children did not appreciably change our results nor did constructing a model with adjustment for all covariates simultaneously or adding back into the model the covariates that were used initially to estimate the predicted probability of placement stability.

Analyses were conducted using Stata.⁴⁶ Permission to use the NSCAW data was granted by the National Data Archive for Child Abuse and Neglect. Approval for the study was obtained from the institutional review board at the Children's Hospital of Philadelphia.

RESULTS

Among the NSCAW cohort, 1404 children entered out-of-home care between their maltreatment report and the subsequent baseline data collection. Of these children, 1309 met the inclusion and exclusion criteria of our study (93% of potential eligible children). At baseline, 28% of the children were younger than 2 years, 50% were 2 to 10 years, and 22% were older than 10 years old. Most children (57%) were reported because of neglect or abandonment (**Table 1**).

Our sample was evenly divided between children who entered kinship care at their initial placement (50%) and those who entered general foster care (50%). Among children who initially entered general foster care, 17% later moved to kinship care (late kinship care) after having spent at least 1 month in foster care. Thirty-five percent of children had an attempted reunification with birth families, with a greater proportion of attempts made for children in general foster care than kinship care (43% vs 28%). Children initially placed into general foster care were also more likely to have had an abnormal baseline behavior score, taken medications in the 12 months prior to the start of the study, used mental health services at the time of baseline data collection, and had a caregiver with serious mental health problems as compared with children who initially entered kinship care (**Table 1**).

After further delineating the onset of kinship care as early or late, children in early kinship care were more likely to be at lower risk for placement instability than both children in late kinship care and general foster care only (**Table 2**). Children in early kinship care were also more likely to achieve early stability: by 36 months, 58% of children in early kinship care were classified as early stable, compared with only 32% of children in general foster care. Although by definition unable to achieve early stability, 58% of late kinship care children still achieved

Table 2. Baseline Risk for Placement Instability and Observed Placement Stability Over the First 36 Months of Out-of-Home Placement by Placement Setting^a

Characteristic	Placement Setting, No. (%)			P Value
	General Foster Care Only (n=584)	Late Kinship Care (n=126)	Early Kinship Care (n=599)	
Risk for instability ^b				
Low	31.5 (155)	34.0 (39)	45.7 (240)	.01
Medium	32.7 (230)	34.9 (51)	31.8 (210)	
High	35.8 (190)	31.1 (36)	22.6 (147)	
Actual placement stability				
Early stable	32.1 (171)	3.9 (4)	57.5 (299)	< .001
Late stable	39.5 (236)	57.7 (76)	24.9 (174)	
Unstable	28.4 (137)	38.4 (46)	17.6 (126)	

Abbreviations: See Table 1

^a Percentages are based on survey weights (n = sample size, unweighted)^b Risk groups derived from a multivariate ordinal logistic regression model predicting log odds of placement instability using baseline attributes. Variables included in the model were baseline behavior score (temperament score if < 2 years, CBCLTM if 2 years or older), child's age, reported mental health service use, prescription medication use within 1 year prior to entry into NSCAW,²⁵ history of prior child protective services involvement, and birth parent with behavioral health problems.**Table 3. Adjusted Probabilities of Behavior Problems at 18 and 36 Months of Children Entering Out-of-Home Care in NSCAW^a**

Variable	18 Months		36 Months	
	Probability (95% Confidence Interval)	P Value	Probability (95% Confidence Interval)	P Value
Placement setting				
General foster care only	0.44 (0.37-0.50)		0.46 (0.41-0.52)	
Late kinship care	0.30 (0.19-0.41)	.13	0.39 (0.34-0.43)	.003
Early kinship care	0.32 (0.25-0.39)	.02	0.32 (0.25-0.38)	.003
Actual placement stability				
Early stable	0.33 (0.26-0.40)		0.32 (0.25-0.39)	
Late stable	0.35 (0.23-0.46)	.95	0.38 (0.27-0.48)	.52
Unstable	0.43 (0.35-0.51)	.14	0.49 (0.39-0.60)	.007
Risk for instability ^b				
Low	0.25 (0.19-0.31)		0.33 (0.27-0.40)	
Medium	0.37 (0.32-0.42)	< .001	0.39 (0.35-0.43)	.04
High	0.51 (0.43-0.60)	< .001	0.45 (0.38-0.52)	.04
Reunification status				
No	0.31 (0.25-0.37)		0.37 (0.28-0.45)	
Yes	0.56 (0.36-0.76)	.11	0.43 (0.25-0.62)	.62

Abbreviations: See Table 1

^a Standardized estimates of predictive margins derived from survey-weighted logistic regression. Each probability was derived under the assumption that all children in the cohort were assigned to that category, adjusting for all other factors in the model.^b Risk groups derived from a multivariate ordinal logistic regression model predicting the likelihood of placement instability using baseline attributes. Variables included in the model were baseline behavior score (temperament score if < 2 years, CBCLTM if 2 years or older), child's age, reported mental health service use, prescription medication use within 1 year prior to entry into NSCAW,²⁵ history of prior child protective services involvement, and birth parent with behavioral health problems.

later stability, compared with 40% of children in general foster care only.

Controlling for placement stability, baseline risk, and reunification status at 18 and 36 months, children in early kinship care had a lower marginal probability of behavioral problems by 36 months (**Table 3**). The estimate of behavioral problems was 46% (95% CI, 41%-52%) if all children had been assigned to general foster care only, compared with 32% (95% CI, 25%-38%) if the children had been assigned to early kinship care. If kinship care had occurred late, by contrast, the estimated risk of behavioral problems was 39% (95% CI, 34%-43%). With regard to placement stability, the probability of behavioral problems was 49% (95% CI, 39%-60%) if children had an unstable placement his-

tory, compared with 32% (95% CI, 25%-39%) if children were conferred early stability. Finally, in a 2-dimensional analysis across all categories of placement stability, there was a lower expected probability of behavioral problems if children had entered early kinship care vs general foster care (**Figure**); the risk of behavioral problems if children had entered late kinship care fell between these 2 groups.

COMMENT

Our study demonstrated a protective effect of kinship care on the early behavioral outcomes of a nationally representative cohort of children entering out-of-home care.

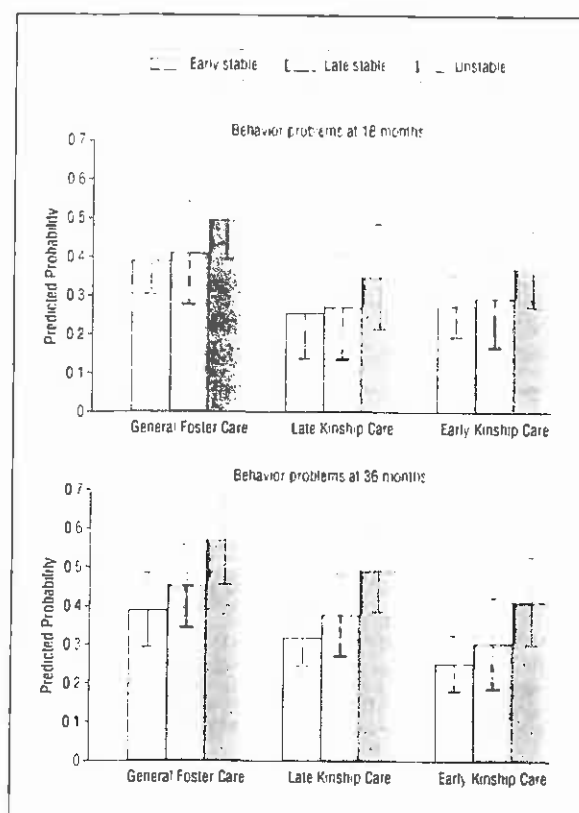


Figure. Standardized estimates of behavior problems at 18 and 36 months in out-of-home care stratified by a child's placement setting and placement stability. These data are marginally standardized using survey-weighted logistic regression, adjusting for the risk for instability and reunification status of the child. Probabilities presented with 95% confidence intervals.

Compared with children entering foster care, children entering kinship care had a lower estimated risk of behavioral problems, even after accounting for their lower baseline risk and increased placement stability. Even children who moved to kinship care after sustained periods of foster care showed some benefit. The magnitude of this association between placement setting and later behavioral problems should reassure a child welfare community that has increasingly moved children toward kinship placements in recent years.

While this study provides evidence to encourage the placement of children with willing and available kin, we urge caution in interpreting the findings for 3 reasons. First, NSCAW did not collect sufficient information about extended families to clarify whether children placed into foster care had acceptable and safe alternatives within their own families. While the late kinship care group demonstrated that at least some of these children had available kin, for others kinship care will likely remain an unrealistic option. For these children, our secondary finding that placement stability improves behavioral outcomes for all children affirms prior findings²⁴ and provides an appealing option for intervention to improve outcomes over time, regardless of placement into kinship care or general foster care. Second, reporter bias might have contributed to some of our findings. Prior studies have demonstrated that kin caregivers might be less likely to report behavioral problems among children in their care

than foster parents or teachers.²⁵⁻²⁷ Our analyses did, however, adjust for baseline behavioral assessments, and many of these assessments were provided by the same kin caregivers who later reported outcome data. Finally, the results are not the product of a randomized study and it remains possible that unobserved confounding might explain both the assignment of placement setting and differences in behavioral outcomes.

Beyond these limitations and the need for further research to confirm and elaborate on these findings are further concerns about generalizability because these data, although broad, cannot incorporate local variations and may not reach the entire universe of children in kinship care. The decision to place a child in kinship care often involves appraising the trade-offs of granting prompt access to kin, delaying access to permit time for certification, or, increasingly in recent years, moving children away from the system to temporary legal custody arrangements. Many of these latter circumstances, in which an open case to child welfare is quickly closed after the child is placed with a kin caregiver, involve caregivers who would have a difficult time achieving certification as a foster parent within the child welfare system, whether because of specific income or health criteria or simply scheduling compliance with the training necessary for certification. For these families, temporary legal custody arrangements have become an expedient alternative that might also shield them from continued scrutiny. Unfortunately, children in these more informal kinship arrangements would not have been easily identified within the NSCAW cohort. As such, their outcomes were likely unmeasured in this analysis and will require further study.

These generalizability concerns aside, it is still hard to overlook the magnitude of the protective effect observed for children in kinship care. At the same time, family members who provide kinship care (often to several siblings) are not without needs themselves, given health problems and poverty stemming from intergenerational cycles of maltreatment. Although children in kinship care fared better than children in foster care in this study, overall rates of behavioral problems in both groups exceed rates observed in other children who are raised in-home without involvement of the child welfare system.²⁸ Furthermore, even in comparison with a foster care population whose needs are systematically unaddressed,^{21,29-30} the literature suggests that the unmet needs for kinship families are even greater, given the barriers to accessing public programs, which are magnified when families lack the support of the child welfare system. Although the longitudinal impact of poverty could not be measured accurately among children in out-of-home care with the NSCAW data, at baseline we estimated that 44% of children entering kinship care resided with families whose income was lower than the federal poverty level, as compared with 23% of their peers who entered foster care. In addition, an Urban Institute report in 2002 found that only one-third of informal kinship families even obtained the cash assistance benefits from Temporary Assistance to Needy Families for which their children were eligible.³¹ Access to education, Medicaid, mental health services, and

other benefits also poses barriers difficult for kin to overcome.^{2,4,5,6}

These concerns about the support provided to kinship families have risen to the federal level of policy. Legislation has been introduced in the 110th Congress that would provide funding for states to provide guardianship benefits to kinship caregivers and to develop navigator programs that would link these caregivers to appropriate services and funding streams for children under their care.^{31,32} This legislation would also require notification to kin on the placement of a relative child in protective custody to facilitate early placement with relatives, potentially increasing the number of children who will enter kinship care early. Our findings suggest that more timely entry into kinship care will be beneficial. When kinship care is a realistic option and appropriate safeguards have been met, children in kinship care might have an advantage over children in foster care in achieving permanency and improved well-being, albeit with the recognition that their needs will remain great, exceeding those of children who have not experienced child maltreatment.

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Author Contributions: Dr Rubin had full access to all of the data in the study and takes responsibility for the integrity of the data and the accuracy of the data analysis.

Study concept and design: Rubin, Downes, O'Reilly, Luan, and Localio. **Acquisition of data:** Rubin and Luan. **Analysis and interpretation of data:** Rubin, Downes, O'Reilly, Mekonnen, Luan, and Localio. **Drafting of the manuscript:** Rubin, Downes, O'Reilly, Mekonnen, and Localio. **Critical revision of the manuscript for important intellectual content:** Rubin, Downes, O'Reilly, Mekonnen, Luan, and Localio. **Statistical analysis:** Rubin, Downes, O'Reilly, Luan, and Localio. **Obtained funding:** Rubin. **Administrative, technical, and material support:** Rubin, O'Reilly, Mekonnen, and Luan. **Study supervision:** Rubin, O'Reilly, and Localio. **Financial Disclosure:** None reported.

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Announcement

Topic Collections. The Archives offers collections of articles in specific topic areas to make it easier for physicians to find the most recent publications in a field. These are available by subspecialty, study type, disease, or problem. In addition, you can sign up to receive a Collection E-Mail Alert when new articles on specific topics are published. Go to <http://archpedi.ama-assn.org/collections> to see these collections of articles.

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Is Kinship Care Good for Kids?

by Tiffany Conway and Rutledge Q. Hutson
March 2, 2007

More than 2.5 million children are being raised by grandparents and other relatives because their parents are unable—for a variety of reasons—to care for them.¹ These relative caregivers are willing to care for the children—but they may require financial help in order to meet the children's needs. A number of states have utilized subsidized guardianship programs as a way of supporting such families, often called "kinship families." Such placements help the child to, among other things, maintain family—and oftentimes community—connections. These programs provide subsidies to relatives and, in some cases, other interested, non-relative adults who are caring for and have a close emotional bond with children who are not biologically their own.

Subsidized guardianship is consistent with national policy preferences espoused in both the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and the Adoption and Safe Families Act of 1997,² and there is considerable evidence of the value of subsidized guardianship programs. Still, some wonder whether kinship care is a good thing—and how we know this. This fact sheet addresses these often unasked but crucial questions.

Children in kinship care experience greater stability.

- Children in kinship foster care have been found to experience fewer placement changes than children placed with non-kin foster parents do.³
- Multiple studies indicate the value of placing siblings together, when safe and appropriate.⁴ Perhaps equally as important, children in foster care consistently express the desire to be with their siblings. Research has shown that children in foster care are more likely to live with their siblings if they are placed with kin.⁵
- Fewer children in kinship care report having changed schools (63 percent) than do children in non-relative foster care (80 percent) or those in group care (93 percent).⁶
- Children who reunify with their birth parent(s) after kinship care are less likely to re-enter foster care than those who had been in non-relative foster placements or in group care facilities.⁷
- The Child and Family Services Reviews (CFSR) are designed to ensure that states are achieving safety, permanency, and child and family well-being. Kinship care bolsters states' ability to comply with federal requirements by providing children with stability and permanency.⁸

Children in kinship care report more positive perceptions of their placements and have fewer behavioral problems.

- Compared to children in non-relative foster care and those in group care, children in kinship care are:
 - ✓ More likely to report liking those with whom they live (93 percent vs. 79 percent [non-relative foster care] and 51 percent [group care])
 - ✓ More likely to report wanting their current placement to be their permanent home (61 percent vs. 27 percent and 2 percent)⁹
 - ✓ Less likely to report having tried to leave or run away (6 percent vs. 16 percent and 35 percent)¹⁰
 - ✓ More likely to report that they "always felt loved" (94 percent vs. 82 percent [non-relative foster care])¹¹

- In terms of scores in physical, cognitive, emotional, and skill-based domains, children in kinship care have scores more like those of children who are able to remain at home following a child abuse and neglect investigation than do children in foster or group care.¹²
- Both teachers and caregivers tend to rate children in kinship care as having fewer behavioral problems than do their peers in other out-of-home placement settings.¹³

Kinship care respects cultural traditions and may reduce racial disparities in a variety of outcomes.

In a number of cultures—including many communities of color—the family and home are understood to include the extended family, and in some cases the community. Kinship care represents an opportunity for states to provide federally required safety and permanency to a greater number of children who come into contact with the child welfare system, while enhancing their well-being by providing them with access to their ethnic, racial, and cultural traditions.¹⁴

Kinship caregivers provide stability to children and youth with incarcerated parents.

According to a 2000 report from the Bureau of Justice Statistics, over 75 percent of mothers and about 18 percent of fathers incarcerated in state prisons in 1997 reported that their children were being cared for by a grandparent or other relative.¹⁵ The incarceration of a parent is often traumatic on a variety of levels for children, and living with family members can provide some measure of stability.

In spite of the numerous benefits associated with kinship care, myths remain.

Myth: “The apple doesn’t fall far from the tree.”

In fact, research shows that children living with relatives are no more likely—and are perhaps less likely—than children living with non-kin foster parents to experience abuse or neglect after being removed from their homes. A 1997 study found that non-kin foster parents were twice as likely as licensed kinship foster parents to have a confirmed report of maltreatment.¹⁶ Furthermore, Illinois found that children in kinship foster care are at lower risk for maltreatment than are children in either specialized or non-relative foster care.¹⁷

Myth: “It’s your moral responsibility.”

Clearly, kinship caregivers agree. They take the responsibility of raising their grandchildren, nieces, and nephews when the children’s parents, for a variety of reasons, cannot. These caregivers lack neither morals nor a sense of responsibility; they do, however, lack resources. They may be living on a fixed income or be retired; whatever the reason, it is highly unlikely that they planned financially for raising a relative’s child.¹⁸

- The United States Department of Agriculture estimates that it costs at least \$7,000 per year to raise a child.¹⁹
- The vast majority of children living with relative caregivers are eligible for the Temporary Assistance for Needy Families (TANF) child-only grant. However, 70 percent of relative caregivers do not access TANF or any other public financial assistance.
- Even when caregivers access TANF child-only grants, this assistance amounts to, on average, just over \$4,000 per year—or about 57 percent of the anticipated cost of raising a child.²⁰

Research debunks these old fears about the risk of placing children with kin.

In fact, the research tells us that *many children who cannot live with their parents benefit from living with grandparents and other family members*. Supporting kinship caregivers in their efforts to address the needs of these children thus provides an opportunity to improve the lives of many children who have already experienced trauma.

- ¹ U.S. Department of Commerce, Bureau of the Census, *2000 Census American Fact Finder Advanced Query*. Calculations by Children's Defense Fund of the number of children living in relative-headed households without either parent present.
- ² The Personal Responsibility and Work Opportunity Reconciliation Act (P.L. 104-193) requires states to consider giving preference to relatives over non-related caregivers when determining a placement for a child, assuming that relative meets all relevant state child protection standards. The Adoption and Safe Families Act (P.L. 105-89) clearly establishes legal guardianship as an acceptable and appropriate permanency plan.
- ³ Testa, M. 2001. *Kinship care and permanency*. Journal of Social Service Research, Vol. 28 (1) pp. 25 – 43.; Chamberlain, P., et al. 2006. *Who disrupts from placement in foster and kinship care?* Child Abuse & Neglect, Vol. 30, pp. 409 – 424.
- ⁴ Herrick, M. & Piccus, W. 2005. *Sibling Connections: The importance of nurturing sibling bonds in the foster care system*.
- ⁵ Shlonsky, A., Webster, D., & Needell, B. 2003. *The ties that bind: A cross-sectional analysis of siblings in foster care*. Journal of Social Service Research, Vol. 29 (3) pp. 27 – 52.; Wulczyn, F. & Zimmerman, E. 2005. *Sibling placements in longitudinal perspective*. Children and Youth Services Review, Vol. 27, pp. 741-763.
- ⁶ National Survey of Child and Adolescent Well-Being (NSCAW) CPS Sample Component Wave 1 Data Analysis Report, April 2005. (Washington, D.C.: U.S. Department of Health & Human Services, Administration for Children & Families, 2005).
- ⁷ Courtney, M. & Needell, B. "Outcomes of kinship care: Lessons from California." In *Child welfare research review*. Vol. 2. J.D. Berrick, R.P. Barth and N. Gilbert, eds. New York: Columbia University Press, 1997, pp. 130 – 149.
- ⁸ Outcome P1: Children have permanency and stability in their living situations; and, Outcome P2: The continuity of family relationships and connections is preserved for children.
- ⁹ NSCAW 2005.
- ¹⁰ NSCAW 2005.
- ¹¹ Wilson, L. Satisfaction of 1,100 Children in Out-of-Home Care, Primarily Family Foster Care, in Illinois' Child Welfare System. Tallahassee, FL: Wilson Resources, 1996.
- ¹² NSCAW 2005.
- ¹³ NSCAW 2005.
- ¹⁴ Casey Family Programs. *Commitment to Kin: Elements of a support and service system for kinship care*. 2004; CFSR Outcome S2: Children are safely maintained in their homes whenever possible and appropriate.
- ¹⁵ Mumola, C. *Bureau of Justice Statistics Special Report: Incarcerated Parents and Their Children*. (Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, 2000).
- ¹⁶ Zuravin, S.J., et al. "Child Maltreatment in family foster care: Foster home correlates." In *Child welfare research review*. Vol. 2 J.D. Berrick, R.P. Barth. And N. Gilbert, eds. New York: Columbia University Press, 1997, pp. 189-200.
- ¹⁷ *A Child Welfare Research Agenda for the State of Illinois*. 1999. Urbana, IL: The Children and Family Research Center, University of Illinois at Urbana-Champaign.
- ¹⁸ Some question whether relatives who cannot afford to care for a child without assistance are appropriate placements. CLASP believes that placements with relatives, like all placements, should be made on a case-by-case basis and that when relatives offer benefits, like greater stability and less trauma, they should be supported in caring for a child.
- ¹⁹ This calculation is based on the cost of raising the younger of two children in a single-parent, two-child household with a before-tax income of less than \$41,700. Lino, Mark. 2005. *Expenditures on Children by Families, 2004*. U.S. Department of Agriculture, Center for Nutrition Policy and Promotion. Miscellaneous Publication No. 1528-2004. Retrieved 12/7/06 from <http://www.cnpp.usda.gov/Publications/CRC/crc2004.pdf>
- ²⁰ Table 42, *Temporary Assistance for Needy Families- Active Cases, TANF Families with no adult recipients receiving cash assistance October 2003 – September 2004*. Administration for Children and Families, Office of Family Assistance. Retrieved 12/6/06 from <http://www.acf.hhs.gov//programs/ofa/character/FY2004/tab42.htm>.

Secs. 1012, 1031 F.C. *SP-FNT Pt 11 Com* (Child Protective)

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK, COUNTY OF NEW YORK

Attorney: HARTLEY, P
Judge:

In the Matter of

Docket No: N-00330/08

~~AMER. RE. 11-5~~

A Child Under Eighteen Years
of Age Alleged to be Neglected by

ZOILA IGLESIAS
ANUBUS RIVAS

PETITION
NEGLECT CASE

Child Protective Specialist:
HELEN COLON
ACS #: 5247005
Unit #: 430-1
Telephone: 212-676-6865

Respondent (s)

NOTICE: IF YOUR CHILD REMAINS IN FOSTER CARE FOR FIFTEEN (15) OF THE MOST RECENT TWENTY-TWO (22) MONTHS THE AGENCY MAY BE REQUIRED BY LAW TO FILE A PETITION TO TERMINATE YOUR PARENTAL RIGHTS AND MAY FILE BEFORE THE END OF THE 15-MONTH PERIOD.

TO THE FAMILY COURT:

The undersigned petitioner respectfully shows that:

- (1) Petitioner HELEN COLON employed by Administration for Children's Services, a Child Protective Agency with offices at 150 William Street, New York, New York, is authorized to file a petition under Article 10 of the Family Court Act.
- (2) ~~A. RE. 11-5~~ is a male child under the age of eighteen years, having been born on 08/28/2004.
- (3) Said child resides at 45 JACKSON AVENUE #3E, NEW YORK, NY, 10002. Child is presently at 492 1st Avenue, New York, NY 10016
- (4) The father of said child is or is alleged to be JOSELITO R. ~~RE. 11-5~~ who resides at UNKNOWN. The father's date of birth is 11/07/1975. The father is currently incarcerated at UNKNOWN. The mother of said child is KIM Q. ~~RE. 11-5~~, who resides at UNKNOWN, The mother's date of birth is 04/07/1977. The other persons legally responsible for the care of said child are

ZOILA IGLESIAS, Maternal Grandparent, who resides at 45 JACKSON AVENUE #3E, NEW YORK, NY, 10002.

ANUBUS RIVAS, Paternal Uncle, who resides at 45 JACKSON AVENUE #3E, NEW YORK, NY, 10002.

- (5) Prior to the filing of this petition, pursuant to Family Court Act Section (1024) said child was removed from the custody of the parent(s) or other person(s) legally responsible for the care of said child without court order on the 6th day of February, 2008, at 12:00 pm.

- (6) There was not sufficient time to obtain a court order pursuant to Family Court Act Section 1022, because

See Addendum II.

- (7) The removal of the child was necessary because

See Addendum III.

- (8) (Upon information and belief), said child is a neglected child in that: (Specify grounds of neglect under Section 1012 of the Family Court Act.)

See Addendum I.

- (9) (Upon information and belief),

ZOILA IGLESIAS, the Paternal Grandparent of said child
ANUBUS RIVAS, the Paternal Uncle of said child

are the person's who are responsible for neglect of said child.

Petitioner is required to obtain education information and to provide that information to foster care providers and other parties to this proceeding. Unless otherwise obtained by release, Petitioner thus seeks a court order to obtain the education records (including special education records) of each child named in this petition who is not placed with a parent(s)/legal guardian(s), and a court order to provide such records to service providers where such records are necessary to enable the service provider to establish and implement a plan of service.

WHEREFORE, Petitioner prays that an order be made determining the said ~~ANUBUS RIVAS~~ to be a neglected child, otherwise dealing with said child in accordance with the provisions of Article 10 of the Family Court Act.

Dated: 02/07/2008



Petitioner

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HELEN COLON, being duly sworn, deposes and says that (s)he is employed by Administration for Children's Services, a Child Protective Agency; and is acquainted with the facts and circumstances of the above-entitled proceeding; that (s)he has read the foregoing petition and knows the contents thereof; that the same is true to (his) (her) own knowledge except as to those matters therein stated to be alleged upon information and belief, and that as to those matters (s)he believes it to be true.

Helen Colon

Petitioner

JOHN B. MATTINGLY, Commissioner
Administration for Children's Services

By: HELEN COLON
Child Protective Specialist

Sworn to before me, this

7th day of FEBRUARY, 2008

Larry B. Steptoe

Notary Public

(Deputy) Clerk of the court

LARRY B. STEPTOE
Commissioner of Deeds
City of New York No. 1-8758
Certificate Filed in New York County
Commission Expires Dec. 1, 2008

ADDENDUM I

CASE NAME: KATHRYN ZELENY
CHILD NAME: [REDACTED]
CASE NUMBER: 5247005
DATE PET FILED: 02/07/2008

THE CHILDREN:

[REDACTED] R [REDACTED] (DOB 10/28/1994)
A [REDACTED] (DOB 08/28/2004)

THE RESPONDENTS:

ZOILA IGLESIAS
ANUBUS RIVAS

[REDACTED] R [REDACTED], born 10/28/94, and A [REDACTED] [REDACTED], born 8/28/04, are children less than eighteen years of age whose physical, mental or emotional conditions have been impaired or are in imminent danger of becoming impaired as a result of the failure of the respondent paternal grandmother, ZOILA IGLESIAS, and the respondent paternal uncle, ANUBUS RIVAS, persons legally responsible for their care, to exercise a minimum degree of care in that:

1. The respondent paternal uncle, ANUBUS RIVAS, fails to provide the subject children with proper supervision and guardianship in that:
 - a. According to a police officer with the NYPD, on or about 2/6/08, the police raided the home of the respondent paternal grandmother, ZOILA IGLESIAS, and the respondent RIVAS pursuant to a search warrant. The police officer further stated that during the raid, members of the NYPD recovered one bag of marijuana, one bag of cocaine, and 806 U.S. dollars. The police officer stated that the subject children were in the home at the time of the raid and the drugs were accessible to them. The respondents IGLESIAS and RIVAS were subsequently arrested. The respondent RIVAS was charged with criminal possession of a controlled substance. The police officer further stated that the police had purchased controlled substances from the respondent RIVAS within the two weeks prior to the raid.
2. The respondent paternal uncle, ANUBUS RIVAS, misuses a drug or drugs, including but not limited cocaine, and is not voluntarily and regularly participating in a rehabilitative program in that:
 - a. The respondent RIVAS admitted to the ACS caseworker that the bag of cocaine recovered during the above described raid was for his own personal use.
 - b. The respondent RIVAS further admitted to the ACS caseworker that he uses drugs once per week.
 - c. Upon information and belief, the respondent RIVAS is not currently enrolled in a drug rehabilitative program.
3. The respondent paternal grandmother, ZOILA IGLESIAS, fails to provide the subject children with proper supervision and guardianship in that the respondent IGLESIAS knew or should have known that the respondent RIVAS fails to provide the subject children with adequate supervision and guardianship and misuses a drug or drugs and is not voluntarily and regularly participating in a rehabilitative program, which is impairs his ability to care for the subject children in that:

- a. The subject child, ~~AK B~~, is in the respondent IGLESIAS'S care pursuant to docket number V-06174/98, and the subject child, ~~AK B~~, is in the respondent IGLESIAS'S care pursuant to docket number V-28171/04.
- b. According to a police officer with the NYPD, while the police conducted the above described raid on the respondents' home, the home smelled of marijuana, and the respondent IGLESIAS and the subject children were present in the home at the time.
- c. The respondent IGLESIAS admitted to the ACS caseworker that she knows the respondent ~~AK B~~ RIVAS uses marijuana.
- d. The respondent RIVAS stated to the ACS caseworker that the respondent IGLESIAS "knows that he smokes."
- e. The subject child stated to the ACS caseworker that he knew the respondent RIVAS possessed drugs and that he had expected the respondent RIVAS to be arrested.

WHEREFORE, the subject children, ~~AK B~~ and ~~AK B~~, are neglected children, or are in danger of becoming neglected children.

ADDENDUM II

PURSUANT TO FAMILY COURT ACT SECTION 1031 (a) Petitioner states:

1. ~~Amara~~ ~~Amara~~ was removed prior to filing this petition on
6th day of February, 2008 at 12:00 pm.
2. The circumstances necessitating the removal of the child prior to filing a neglect or abuse petition are as follows:
 - ☒ See allegation(s) in the petition;
 - ☐ Petitioner assessed the child to be in such circumstances that the child's continuing in said place or residence or in the care and custody of the parent or other person legally responsible presented an imminent danger to the child's life and/or health if not immediately removed;
 - ☐ Continuation in the home would be contrary to the child's best interests and under the circumstances, efforts to prevent or eliminate the need for removal were determined to be inappropriate;
 - ☐ Other, explain:
3. This child was removed pursuant to:
 - ☐ FCA 1021 (parental consent to temporary removal attached);
 - ☐ FCA 1022 (court authorized removal);
 - ☒ FCA 1024 (emergency removal without prior court authorization);
4. This was an emergency removal under FCA 1024 because the parents or other persons legally responsible refused to consent or were unavailable and there was insufficient time to obtain a court order pursuant to FCA 1022 because:
 - ☐ Removal occurred outside of court hours, i.e. evening, weekend or holiday;
 - ☐ Court was unavailable to entertain removal application;
 - ☐ Child was in need of immediate protective action based upon assessment of imminent danger;
 - ☒ Other, explain: Both caretakers for the children were arrested and unavailable at all relevant times.

ADDENDUM III

REASONABLE EFFORTS TO PREVENT OR ELIMINATE THE NEED FOR REMOVAL
OF CHILD FROM HOME

1. The child ~~AC~~ ~~was~~ was or should be removed pursuant to the provisions of the Family Court Act and applicable law.
2. The continuation of residence by the child in the child's home is or would be contrary to the welfare and best interests of the child and the temporary removal of said child from the child's place of residence is necessary to avoid imminent risk to the child's life or health. Continued placement of the child in the child's home would be contrary to the welfare and best interests of the child because:

Both caretakers for the children were arrested. The respondent RIVAS sells and uses drugs in the home, and the respondent IGLESIAS knows about it.

3. ☒ Reasonable efforts to prevent or eliminate the need for the above-described removal, were not made prior to the date of the hearing, but the lack of such efforts was reasonable and appropriate under the circumstances (see allegations in petition) for the following reason(s):
 - a. ☐ The circumstances (see allegations in petition) posed such a risk to the child's life, health or safety that services could not eliminate or avoid the need for removal; explain:
 - b. ☒ The parent was incarcerated or in police custody at all relevant times, precluding the provisions of any services to eliminate or avoid the need for removal,
 - c. ☐ The parent's whereabouts were unknown at all relevant times, precluding the provision of any services to eliminate or avoid the need for removal, ACS made the following efforts to locate the parent; explain:
 - d. ☐ Other: explain:
4. Imminent risk to the child would not be eliminated by the issuance of a temporary order of protection.

Secs. 1012, 1031 F.C.

(Child Protective)

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK, COUNTY OF NEW YORK

Attorney: HARTLEY, P

Judge:

-----X
In the Matter of

Docket No: N-00331/08

~~REDACTED~~ ~~REDACTED~~

PETITION
NEGLECT CASE

A Child Under Eighteen Years
of Age Alleged to be Neglected by

ZOILA IGLESIAS
ANUBUS RIVAS

Child Protective Specialist:

HELEN COLON

ACS #: 5247005

Unit #: 430-1

Telephone: 212-676-6865

Respondent (s)
-----X

NOTICE: IF YOUR CHILD REMAINS IN FOSTER CARE FOR FIFTEEN (15) OF THE MOST RECENT TWENTY-TWO (22) MONTHS THE AGENCY MAY BE REQUIRED BY LAW TO FILE A PETITION TO TERMINATE YOUR PARENTAL RIGHTS AND MAY FILE BEFORE THE END OF THE 15-MONTH PERIOD.

TO THE FAMILY COURT:

The undersigned petitioner respectfully shows that:

- (1) Petitioner HELEN COLON employed by Administration for Children's Services, a Child Protective Agency with offices at 150 William Street, New York, New York, is authorized to file a petition under Article 10 of the Family Court Act.
- (2) ~~REDACTED~~ ~~REDACTED~~ is a male child under the age of eighteen years, having been born on 10/28/1994.
- (3) Said child resides at 45 JACKSON AVENUE #3E, NEW YORK, NY, 10002.
- (4) The father of said child is or is alleged to be JORGE ~~REDACTED~~ who resides at 45 JACKSON AVENUE #3E, NEW YORK, NY, 10002 (LXA). The father's date of birth is 02/24/1972.
The mother of said child is KATHRYN ZELENY who resides at UNKNOWN. The mother's date of birth is 09/11/1976.
The other persons legally responsible for the care of said child are ZOILA IGLESIAS, Paternal Grandparent, who resides at 45 JACKSON AVENUE #3E, NEW YORK, NY, 10002.

ANUBUS RIVAS, Paternal Uncle, who resides at 5 JACKSON AVENUE #3E, NEW YORK, NY, 10002.

- (5) Prior to the filing of this petition, pursuant to Family Court Act Section (1024) said child was removed from the custody of the parent(s) or other person(s) legally responsible for the care of said child without court order on the 6th day of February, 2008, at 12:00 pm.
- (6) There was not sufficient time to obtain a court order pursuant to Family Court Act Section 1022, because

See Addendum II.

- (7) The removal of the child was necessary because

See Addendum III.

- (8) (Upon information and belief), said child is a neglected child in that: (Specify grounds of neglect under Section 1012 of the Family Court Act.)

See Addendum I.

- (9) (Upon information and belief),

ZOILA IGLESIAS, the Paternal Grandparent of said child
ANUBUS RIVAS, the Paternal Uncle of said child

are the person's who are responsible for neglect of said child.

Petitioner is required to obtain education information and to provide that information to foster care providers and other parties to this proceeding. Unless otherwise obtained by release, Petitioner thus seeks a court order to obtain the education records (including special education records) of each child named in this petition who is not placed with a parent(s)/legal guardian(s), and a court order to provide such records to service providers where such records are necessary to enable the service provider to establish and implement a plan of service.

WHEREFORE, Petitioner prays that an order be made determining the said [REDACTED] to be a neglected child, otherwise dealing with said child in accordance with the provisions of Article 10 of the Family Court Act.

Dated: 02/07/2008



Petitioner

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HELEN COLON, being duly sworn, deposes and says that (s)he is employed by Administration for Children's Services, a Child Protective Agency; and is acquainted with the facts and circumstances of the above-entitled proceeding; that (s)he has read the foregoing petition and knows the contents thereof; that the same is true to (his) (her) own knowledge except as to those matters therein stated to be alleged upon information and belief, and that as to those matters (s)he believes it to be true.

Helen Colon

Petitioner

JOHN B. MATTINGLY, Commissioner
Administration for Children's Services

By: HELEN COLON
Child Protective Specialist

Sworn to before me, this

7th day of FEBRUARY, 2008

Larry B. Steptoe

Notary Public

(Deputy) Clerk of the court

LARRY B. STEPTOE
Commissioner of Deeds
City of New York No. 1-6762
Certificate Filed in New York County
Commission Expires Dec. 1, 2008

ADDENDUM I

CASE NAME: KATHRYN ZELENY
CHILD NAME: [REDACTED]
CASE NUMBER: 5247005
DATE PET FILED: 02/07/2008

THE CHILDREN:

[REDACTED] R [REDACTED] (DOB 10/28/1994)
A [REDACTED] (DOB 08/28/2004)

THE RESPONDENTS:

ZOILA IGLESIAS
ANUBUS RIVAS

[REDACTED] R [REDACTED] born 10/28/94, and A [REDACTED] born 8/28/04, are children less than eighteen years of age whose physical, mental or emotional conditions have been impaired or are in imminent danger of becoming impaired as a result of the failure of the respondent paternal grandmother, ZOILA IGLESIAS, and the respondent paternal uncle, ANUBUS RIVAS, persons legally responsible for their care, to exercise a minimum degree of care in that:

1. The respondent paternal uncle, ANUBUS RIVAS, fails to provide the subject children with proper supervision and guardianship in that:
 - a. According to a police officer with the NYPD, on or about 2/6/08, the police raided the home of the respondent paternal grandmother, ZOILA IGLESIAS, and the respondent RIVAS pursuant to a search warrant. The police officer further stated that during the raid, members of the NYPD recovered one bag of marijuana, one bag of cocaine, and \$06 U.S. dollars. The police officer stated that the subject children were in the home at the time of the raid and the drugs were accessible to them. The respondents IGLESIAS and RIVAS were subsequently arrested. The respondent RIVAS was charged with criminal possession of a controlled substance. The police officer further stated that the police had purchased controlled substances from the respondent RIVAS within the two weeks prior to the raid.
2. The respondent paternal uncle, ANUBUS RIVAS, misuses a drug or drugs, including but not limited cocaine, and is not voluntarily and regularly participating in a rehabilitative program in that:
 - a. The respondent RIVAS admitted to the ACS caseworker that the bag of cocaine recovered during the above described raid was for his own personal use.
 - b. The respondent RIVAS further admitted to the ACS caseworker that he uses drugs once per week.
 - c. Upon information and belief, the respondent RIVAS is not currently enrolled in a drug rehabilitative program.
3. The respondent paternal grandmother, ZOILA IGLESIAS, fails to provide the subject children with proper supervision and guardianship in that the respondent IGLESIAS knew or should have known that the respondent RIVAS fails to provide the subject children with adequate supervision and guardianship and misuses a drug or drugs and is not voluntarily and regularly participating in a rehabilitative program, which impairs his ability to care for the subject children in that:

- a. The subject child, **AN [REDACTED]**, is in the respondent IGLESIAS'S care pursuant to docket number V-06174/98, and the subject child, **R [REDACTED]**, is in the respondent IGLESIAS'S care pursuant to docket number V-28171/04.
- b. According to a police officer with the NYPD, while the police conducted the above described raid on the respondents' home, the home smelled of marijuana, and the respondent IGLESIAS and the subject children were present in the home at the time.
- c. The respondent IGLESIAS admitted to the ACS caseworker that she knows the respondent **RIVAS** uses marijuana.
- d. The respondent RIVAS stated to the ACS caseworker that the respondent IGLESIAS "knows that he smokes."
- e. The subject child stated to the ACS caseworker that he knew the respondent RIVAS possessed drugs and that he had expected the respondent RIVAS to be arrested.

WHEREFORE, the subject children, **R [REDACTED]** and **AN [REDACTED]** are neglected children, or are in danger of becoming neglected children.

ADDENDUM II

PURSUANT TO FAMILY COURT ACT SECTION 1031 (a) Petitioner states:

1. [REDACTED] was removed prior to filing this petition on
6th day of February, 2008 at 12:00 pm.
2. The circumstances necessitating the removal of the child prior to filing a neglect or abuse petition are as follows:
 - ☒ See allegation(s) in the petition;
 - ☐ Petitioner assessed the child to be in such circumstances that the child's continuing in said place or residence or in the care and custody of the parent or other person legally responsible presented an imminent danger to the child's life and/or health if not immediately removed;
 - ☐ Continuation in the home would be contrary to the child's best interests and under the circumstances, efforts to prevent or eliminate the need for removal were determined to be inappropriate;
 - ☐ Other, explain:
3. This child was removed pursuant to:
 - ☐ FCA 1021 (parental consent to temporary removal attached);
 - ☐ FCA 1022 (court authorized removal);
 - ☒ FCA 1024 (emergency removal without prior court authorization);
4. This was an emergency removal under FCA 1024 because the parents or other persons legally responsible refused to consent or were unavailable and there was insufficient time to obtain a court order pursuant to FCA 1022 because:
 - ☐ Removal occurred outside of court hours, i.e. evening, weekend or holiday;
 - ☐ Court was unavailable to entertain removal application;
 - ☐ Child was in need of immediate protective action based upon assessment of imminent danger;
 - ☒ Other, explain: Both caretakers for the children were arrested and unavailable at all relevant times.

ADDENDUM III

REASONABLE EFFORTS TO PREVENT OR ELIMINATE THE NEED FOR REMOVAL
OF CHILD FROM HOME

1. The child ~~ROS~~ was or should be removed pursuant to the provisions of the Family Court Act and applicable law.
2. The continuation of residence by the child in the child's home is or would be contrary to the welfare and best interests of the child and the temporary removal of said child from the child's place of residence is necessary to avoid imminent risk to the child's life or health. Continued placement of the child in the child's home would be contrary to the welfare and best interests of the child because:

Both caretakers for the children were arrested. The respondent RIVAS sells and uses drugs in the home, and the respondent IGLESIAS knows about it.

3. ☒ Reasonable efforts to prevent or eliminate the need for the above-described removal, were not made prior to the date of the hearing, but the lack of such efforts was reasonable and appropriate under the circumstances (see allegations in petition) for the following reason(s):
 - a. ☐ The circumstances (see allegations in petition) posed such a risk to the child's life, health or safety that services could not eliminate or avoid the need for removal; explain:
 - b. ☒ The parent was incarcerated or in police custody at all relevant times, precluding the provisions of any services to eliminate or avoid the need for removal,
 - c. ☐ The parent's whereabouts were unknown at all relevant times, precluding the provision of any services to eliminate or avoid the need for removal, ACS made the following efforts to locate the parent; explain:
 - d. ☐ Other: explain:
4. Imminent risk to the child would not be eliminated by the issuance of a temporary order of protection.

Page 1 of 2

At a term of the Family Court of the State

of New York, County of New York

at 60 Lafayette St

on 2/7/08

PRESENT:

HON. Karen Lupuloff
JUDGE

Administration for
Children's Services
Petitioner

NN-00330/08

Docket No. NN-00330/08

vs.

ALL PURPOSE SHORT ORDER

Zola Iglesias
Amubus Rivas
Respondent

It is hereby ordered that the subject children, A
R and R are paroled to the respondent
legal custodian, Zola Iglesias, at the following
conditions:

1. The respondent, Amubus Rivas, is to be excluded from the home of the respondent, Zola Iglesias, and the respondent Iglesias is ~~to~~ not to allow the children to be in the respondent Rivas's presence.
2. The respondent Iglesias is to fully cooperate with ACS supervision.

It is further ordered that the respondent Rivas and one Chanel Roca are to stay away from the subject children, A and R, and the home of the subject children at 45 Jackson St., Apt. 3E, New York, N.Y. 10002

ENTER:

JUDGE OF THE FAMILY COURT

HON. KAREN I. LUPULOFF

Page 2 of 2

At a term of the Family Court of the State
of New York, County of New York
at 60 Lafayette St
on 2/7/08

PRESENT:

HON. Karen Lupuloff
JUDGE

Ariel Rosario, Jorge Rosario
IN THE MATTER OF
Administration for
Children's Services
Petitioner

NN-CC330/08

Docket No. NN-CC331/08

vs.

ALL PURPOSE SHORT ORDER

Zolba Iglesias

Amibus Rivers
Respondent

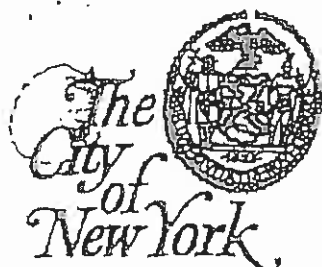
Additionally, ~~four~~ four Temporary Orders of Protection
are issued:

1. Order No. 2008-CC0493 orders one Otoniel Roca to stay away
from ~~Amibus Rivers~~ (NN-CC330/08) and ~~Amibus Rivers~~ home at
115 Jackson St, Apt. 3E, New York, NY 10002.
2. Order No. 2008-CC0492 orders the same Otoniel Roca to stay away
from ~~Amibus Rivers~~ (NN-CC331/08) and ~~Amibus Rivers~~ home at
115 Jackson St, Apt. 3E, New York, NY 10002.
3. Order No. 2008-CC0494 orders the respondent Amibus Rivers to stay
away from ~~Amibus Rivers~~ (NN-CC330/08) and ~~Amibus Rivers~~ home at
115 Jackson St, Apt. 3E, New York, NY 10002.
4. Order No. 2008-CC0491 orders the respondent
Amibus Rivers to stay away from ~~Amibus Rivers~~
(NN-CC331/08) and ~~Amibus Rivers~~ home
at 115 Jackson ~~St~~ St, Apt 3E, New York,
NY 10002.

ENTER

JUDGE OF THE FAMILY COURT

KAREN LUPULOFF



ADMINISTRATION FOR CHILDREN'S SERVICES
COMMISSIONER'S OFFICE
150 William Street - 18th Floor
New York, N.Y. 10038
Phone (212) 341-0958 Fax (212) 341-2946


WILLIAM C. BELL
Commissioner

ANNE WILLIAMS-ISOM
*Special Counsel/
Associate Commissioner*

MEMORANDUM

DATE: July 2, 2004

TO: Executive Directors, Contract Foster Care Agencies
ACS Staff

FROM: Anne Williams-Isom 

SUBJECT: Independent Review Protocol

The purpose of this protocol is to provide information about the Independent Review process and clarify the roles of Independent Review participants. This protocol will specifically outline the process for: notifying foster parents of their right to an Independent Review; requesting an Independent Review; conducting an Independent Review; issuing the Independent Review decision; complying with the Independent Review decision; appealing the Independent Review decision.

ACS ADMINISTRATION FOR CHILDREN'S SERVICES

Protocol for

INDEPENDENT REVIEW

Date: 7/2/04

I. Introduction

The mission of the ACS Office of Advocacy is to provide impartial resolutions to conflicts among parents, children, and foster parents and ACS offices or contract agencies. Within the Office of Advocacy, the Independent Review Unit has been designated by the Commissioner to implement Section 443.5 of the New York State Social Services Regulations (18 NYCRR § 443.5). Section 443.5 provides that foster family parents may request a conference with the social services official

or designee whenever a social services official or another authorized agency proposes to remove a child in foster family care from the foster family home. This conference is called an "Independent Review." At such conference, scheduled within 10 days of receipt of the request for the conference, the foster parents, with or without a representative, may appear to have the proposed action reviewed, be advised of the reasons for the removal, and be afforded an opportunity to submit reasons why the child(ren) should not be removed.

II. Removal from a Foster Home

A. Written Notification of Removal (Form CS-701D)

Foster parents must receive written notification of intent to remove a foster child from their home in all cases of removal, except removals due to a court order or State Fair Hearing Decision. Section 443.5 of the Social Services Regulations states that where a social services official or other authorized agency proposes to remove a child from a certified foster home, the foster parents must be notified in writing (via Form CS-701D). The Form CS-701D contains information explaining the reason for the removal and also provides information relating to the foster parents' right to contest the decision by requesting a review. The caseworker must leave a copy of the Form CS-701D in the case record to document that the form was given to the foster parents.

Section 443.5 also states that written notification must be given at least 10 days prior to the proposed effective date of the removal, except where the health or safety of the child requires that the child be removed immediately from the foster family home.

1. For planned removals, the foster parent must receive the notice (Form CS-701D) at least ten days prior to the removal date. If the foster parent requests an Independent Review, the child may not be removed from the home until at least three days after the notice of decision is sent, or prior to the proposed effective date of removal, whichever occurs later (unless it is subsequently determined that the health or safety of the child requires that the child be removed immediately from the foster home).
2. For emergency removals, Form CS-701D should be given at the time of the removal or as soon as is practicable thereafter (e.g., send by certified mail the next day). The foster parents may request an Independent Review. Note that the foster home cannot be closed until the Independent Review decision is rendered.

B. Contesting the Removal of a Foster Child

Certified foster parents or approved relative foster parents have the right to a review of any removal or plan for removal of a child in foster care unless it is ordered by the court or State Fair Hearing decision. These rights are described on the reverse side of the CS-701D, *Notice For Removal Of Child(ren) From A Foster Home*.

Foster parents who disagree with the removal of the child(ren) from their homes may request any or all of the following:

1. A Foster Care Agency Conference (Note that a foster parent can request a Foster Care Agency Conference only if the removal has not yet occurred. In addition, if the foster parent also requests an Independent Review, the Agency Conference cannot delay ACS's holding the Independent Review in accordance with the timeframes in Section 443.5 of the Social Services Regulations); and/or
2. An Independent Review by calling the Office of Advocacy at ACS (212-676-9002) before the date of the proposed action or if an emergency removal, as soon as is practicable after the removal; and/or
3. A New York State Fair Hearing by writing to the Bureau of Special Hearings.

Foster parents who do not object to the removal of the child from their home may waive their right to a foster care agency or Independent Review by signing, dating and returning the Form CS-701D to the case planner.

III. Requesting an Independent Review

A. Making the Request

Foster parents who are seeking to review the plan to remove or the removal of a foster child from their home may request an Independent Review by calling the ACS Office of Advocacy at (212) 676-9002. This request must be made before the date of the proposed action. In the case of an emergency removal, the request for an Independent Review must be made as soon as is practicable after the removal.

Before scheduling the Independent Review, the foster parent(s) are encouraged to request a meeting with the foster care agency to discuss their objections prior to the removal of the child. If the matter cannot be resolved at the Foster Care Agency Conference or if the foster parent chooses to bypass the Foster Care Agency Conference, the foster parents' request for an Independent Review will be honored. Once the request has been received and accepted by ACS, the Independent Review will be scheduled within ten days.

When foster parents have requested an Independent Review, the removal of a child is stopped except where the health or safety of the child(ren) requires immediate removal.

IMPORTANT: If foster parents need an interpreter or choose to be accompanied by an attorney or a representative, they must state this at the time of scheduling.

B. Requests for an Independent Review Can Be Denied For the Following Reasons:

- A court order has been issued regarding the placement of the subject children. A court order takes precedence over all administrative remedies.
- The person making the request is not a certified or approved foster parent or the child is not in ACS custody.
- The foster parent signed the Notice of Removal, waiving his or her right to an Independent Review.
- The foster parent requested that the child be removed from his/her home.

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- The foster parent making the request is a "second" foster parent. Note that the issue of an Independent Review for a second foster parent arises when the first foster parent, from whose home the child was removed, requests an Independent Review and the decision from that Independent Review directs that the child be returned to the first foster parent. The New York State Office of Children and Family Services has opined that Section 443.5 of the Social Services Regulations does not require that the second foster parent receive a ten-day notice and an Independent Review after a decision was made following an Independent Review to return the child to the first foster parent.

IV. Conducting the Independent Review

A. Scheduling/Postponements of Reviews

Under Section 443.5 of the Social Services Regulations, the Independent Review must be held within 10 days of receipt of the foster parent's request. Once an Independent Review is scheduled, the date of the Independent Review will not be changed unless the foster parent makes such a request (e.g., the foster parent cannot attend the Independent Review) or an issue related to the foster parent arises (e.g., foster parent asks for a translator for the first time the day of the Independent Review and one is not available, the foster parent's attorney is not available). In order to postpone an Independent Review, the foster parent must contact the Reviewer 24-48 hours before the Review date. If an emergency arises the day of the Independent Review, the foster parent must contact the Reviewer as soon as possible to reschedule the Independent Review. The number of postponements allowed will be at the discretion of the Review Officer.

The foster care agency must attend the Independent Review, and send a person who has knowledge of the case and is prepared to discuss the case and reasons for the (proposed) removal. The Independent Review will not be adjourned beyond ten days of receipt of the foster parent's request if the caseworker from the agency handling the case cannot attend. If the caseworker handling the case cannot attend, the foster care agency must send another representative with knowledge of the case.

Should an agency representative not be able to attend within the ten-day timeframe, the Reviewer will use his/her discretion about how to proceed in consultation with ACS Division of Legal Services.

If the ACS Office of Confidential Investigations (OCI) is investigating the foster parent as a result of a report to the State Central Register of suspected child abuse and maltreatment, the Reviewer will explain to the foster parent that the Independent Review must be held within ten days even though the OCI decision will remain outstanding until the investigation is complete. (Note that the Reviewer will further explain that OCI has, by statute, 60 days to conduct its investigation and make a determination regarding the allegations made.)

C. Lateness

Foster parents and agencies are given the time and date of the Review. [NOTE: Section 443.5 states that the social services official shall send written notice of the time and place for the conference to the foster family parents and their representative, if any, and to the authorized agency, if any, at least five days prior to the date of the conference.] It is incumbent upon all the parties to make themselves available on the day and time that have

been allotted for them. If the foster parent does not appear within an hour of the Review appointment, the parties who are present will be released. It is at the Reviewer's discretion whether or not the Review can be rescheduled. If the agency does not appear within an hour of the allotted time to begin the Independent Review, the parties who are present will be released unless the Reviewer determines that the Independent Review can proceed without the agency. If the Review cannot proceed without the agency, it is at the Reviewer's discretion whether or not the Review can be rescheduled.

C. Attendance

- The foster parents must attend the Review and are entitled to be accompanied by a representative of their choice. The representative may be a friend, family member, community representative, foster parent advocate, or an attorney.
- A representative of the foster care agency, ACS Direct Foster Care Services (DFCS) or ACS Direct Care Adoption (DCA) office seeking removal must attend.
- If OCI is involved in the investigation of the foster home, the OCI worker must be present at the review.
- All other persons' attendance is at the discretion of the Reviewer.

Other Parties May be Notified and/or Invited to Participate:

- ACM
- OCACM
- the law guardian

D. Format

The Independent Review is conducted as a social work conference at which the Review Officer (an ACS Child Welfare Specialist Supervisor II) interviews all participants regarding the reasons for the plan for removal or the actual removal. The interviews, along with pertinent reports/documentation, will be used to inform the decision. Such decision will be issued in writing to the foster parents, their representative, if applicable, the ACS office, and the foster care agency within five days of the conference. At the time of decision the foster parents are notified of their right to appeal the decision by requesting a New York State Fair Hearing.

1. The Independent Review is not a legal proceeding and the Review Officer is not a Judge. The Rules of Evidence do not apply at an Independent Review.
2. If the foster parent chooses to bring an attorney, the role of the attorney is to assist the foster parent with responding to the questions posed by the Reviewer. The attorney is not permitted to question other participants at the table nor object to questions asked by the Reviewer. The Reviewer conducts all questioning. See section E below for more details about the role of the foster parents' representatives, which includes attorneys.

3. The Independent Review is tape-recorded.
4. The agency presents its information first, by oral statement and the introduction of supporting documentation, if any.
5. At any point during the review, the foster parent may ask to speak with his/her representative privately.
6. After the agency's presentation, the foster parent presents his/her information regarding the removal.
7. If OCI is involved, the Reviewer will use OCI's 7-day Assessment and the OCI worker will be present to provide information.
8. Input from any other necessary parties that are present at the Review will be at the Reviewer's discretion.

E. Role of the Foster Parent's Representative at the Independent Review

1. The representative can provide the Review Officer with a statement or summary of the position of the foster parent.
2. Representatives will not be allowed to question any participant of the Review.
3. If the representative does have a question, it should be directed to the Review Officer who will decide if the answer to the question is needed for the decision or to apprise the foster parent of the reasons for the proposed action.
4. The representative can provide information pertaining to the removal of the subject child to the Review Officer that the foster parent or agency has not given to the Review Officer.
5. A representative has the right to consult with the foster parent whom he/she is representing.
7. If ACS and/or the foster care agency attend the Independent Review with a representative, these procedures will apply to all representatives.

F. Documentation/Materials Presented at Review

All information to be considered by the Independent Reviewer must be submitted at the time of the conference (including but not limited to the agency case record, medical records, OCI/police/mental health or other reports, statements of the foster parent(s), agency representatives or other interested parties). It is critical that all parties to the conference arrive at the conference prepared with all statements or documents that they wish to be considered by the Reviewer. Because the Independent Review is not a legal proceeding, the rules of discovery do not apply. Accordingly, the Reviewer will determine what documents, if any, the participants at the Independent Review are entitled to receive. Whatever documents the Reviewer accepts for consideration as part of the decision-making process will be given to the participants except where confidentiality would prohibit disclosure.

V. The Independent Review Decision

Under Section 443.5(c) of the Social Services Regulations, ACS must render a decision within five days of the Independent Review.

A. Internal Review of the Independent Review Decision

If, after the Independent Review, the Office of Advocacy renders a decision that differs from OCI's recommendation (e.g., OCI recommends that the foster home be closed), the Office of Advocacy will review its decision with OCI. If OCI has obtained new information that was not discussed at the Independent Review, the foster care agency, DFCS, or DCA will issue another Form CS-701D, which will advise the foster parent of the right to request another Independent Review.

If OCI has not obtained any new information and its recommendation differs from the decision of the Independent Review, the Office of Advocacy and OCI will discuss their respective conclusions. If the conclusions of the Office of Advocacy and OCI still differ, the Deputy Commissioners who oversee the Office of Advocacy and OCI will review the Independent Review decision and the OCI recommendation. If necessary, they will consult with the Commissioner. They will then render a final decision, which will be sent to the parties.

B. Implementing the Independent Review Decision

Foster care agencies must comply with the Independent Review decision, even if they do not agree with it. NOTE: Section 443.5 states that the child shall not be removed from the foster family home until at least three days after the notice of decision is sent, or prior to the proposed effective date of removal, whichever occurs later. If the child has already been removed, the agency must comply with the Independent Review decision within 72 hours. If a foster care agency has a question about the decision, the agency should contact the Office of Advocacy.

If the Office of Advocacy has rendered its decision not to remove or return the child to the foster home and OCI and/or the foster care agency, DFCS, or DCA subsequently learn new information about the case that warrants removing the child, the foster care agency, DFCS, or DCA must issue another Form CS-701D, which will advise the foster parent of the right to request another Foster Care Agency Conference and/or Independent Review and/or New York State Fair Hearing.

C. Appealing the Decision of the Independent Review

The foster parent has the right to appeal the decision of the Independent Review by requesting a Fair Hearing with the New York State Office of Children and Family Services. It is important to note that if a Fair Hearing was requested at the same time an Independent Review was requested, the decision of the Independent Review must be implemented. Agencies cannot wait until the Fair Hearing is held and/or a decision is rendered. Information instructing a foster parent on the procedure to request a Fair Hearing will be provided at the time of the Independent Review. Note that the foster parent is informed of the right to request a Fair Hearing on Form CS-701D (Notice of Removal Form), at the Independent Review, and in the Independent Review Decision.

At a term of the Family Court of the
State of New York, held in and for
the County of Kings, at 330 Jay
Street, Brooklyn, NY 11201, on
February 13, 2008

PRESENT: Edward W. Yuskevich, Referee

In the Matter of

K [REDACTED] (DOB: 12/26/2001),

A Child under Eighteen Years of Age
Alleged to be Neglected by

File #: 45851
Docket #: NN-37162-04

CPS #: 5339097

ORDER

Kim Q [REDACTED]

Respondent.

PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO APPELLANT BY THE CLERK OF COURT, OR 30 DAYS AFTER SERVICE BY A PARTY OR THE LAW GUARDIAN UPON THE APPELLANT, WHICHEVER IS EARLIEST.

IT IS ORDERED that the subject child, K [REDACTED], is to be returned to the foster care restrictive placement with her paternal grandmother, Zoila Iglesias, within twenty-four (24) hours. The paternal grandmother, Zoila Iglesias, may not permit her son, Anubis Rivas to visit her home or have any contact with the subject child, K [REDACTED].

This matter is hereby adjourned until February 25, 2008 in Part 48 at 12:00 P.M.

Dated: February 13, 2008

ENTER



Edward W. Yuskevich, Referee

Check applicable box:

- ☐ Order mailed on [specify date(s) and to whom mailed]: _____
- ☐ Order received in court on [specify date(s) and to whom given]: _____

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1

65N5HAYA argument
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

ALICE HAYNES,

Plaintiff,

v.

06 Civ. 1383 (TPG)

JOHN MATTINGLY, et al.,

Defendants.

-----x

May 23, 2006

Before:

HON. THOMAS P. GRIESA,

District Judge

APPEARANCES

LANSNER & KUBITSCHKEK
Attorneys for Plaintiff
BY: CAROLYN KUBITSCHKEK
DARIUS CHARNEY
STACY CHARLAND

THE CHILDREN'S LAW CENTER
Attorneys for Ameena B.
BY: JANET NEUSTAETTER

MICHAEL A. CARDOZO
Corporation Counsel for the City of New York
BY: JESSIE LEVINE
Assistant Corporation Counsel

ELIOT SPITZER
Attorney General of the State of New York
BY: ROBERT KRAFT
Assistant Attorney General

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(212) 805-0300

2

65N5HAYA argument

(Case called)

THE COURT: What is the motion before the Court?

MS. KUBITSCHKEK: Your Honor, my name is Carolyn
Kubitschek. I represent plaintiff Alice Haynes who is the
movant.

This is a motion to reargue, reconsider and renew the
motion for the preliminary injunction which was argued on April
11th in front of this Court and the Court at the time denied
the preliminary injunction.

We filed the motion to reargue because we felt there

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11 were legal issues that should be reconsidered. But, during the
 12 passage of time, the factual picture has also changed and so,
 13 we are seeking to renew the motion based upon the fact that
 14 there are factual statements which were made in oral argument
 15 which turned out to be inaccurate, specifically both the
 16 intervenors, the Children's Law Center and the City of New York
 17 stated repeatedly and have stated both orally and in writing
 18 that Ms. Haynes belongs in some state court or state
 19 administrative proceeding where she can be heard.

20 Specifically, both the intervenors and the City of New
 21 York said that if Ms. Haynes were to go to the family Court
 22 when Ameena's case was on they -- that is intervenors and the
 23 City -- would not object to her participating.

24 In fact, the case was on in the family Court on May
 25 10th and Ms. Haynes and her lawyers went to the family court

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65N5HAYA argument

1 and both the intervenors and the City of New York objected and
 2 said Ms. Haynes -- argued that Ms. Haynes not be permitted to
 3 participate or to be heard in any capacity, and they argued
 4 that she lacked standing. And the family court judge agreed
 5 and said that Ms. Haynes lacked standing and therefore could
 6 not be heard in the family court not as a party, not as an
 7 intervenor, not as a friend of the Court. Not at all.

8 Then, the City of New York, the lawyer for the City of
 9 New York said that Ms. Haynes and her lawyer should not even be
 10 allowed to watch the goings on in the family court.

11 Now, your Honor, normally the courts of the State of
 12 New York are open to all spectators just as the federal courts
 13 are, but in this particular case the family court judge said to
 14 Ms. Haynes and to us, her lawyers, that we would have to leave
 15 the courtroom immediately, we could not even watch.

16 THE COURT: Was Ms. Haynes there?

17 MS. KUBITSCHK: Ms. Haynes was there, yes. But she
 18 was ordered to leave, as was my law firm. And she and the
 19 lawyers did leave, complied with the order.

20 The family court judge said that Ms. Haynes could
 21 order the transcript and she has done so. We are waiting for
 22 the court reporters to produce the transcript of what happened.

23 THE COURT: What was the proceeding in the family
 24 court?

25 MS. KUBITSCHK: There were two proceedings on at the
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65N5HAYA argument

1 same time. One was a proceeding to terminate the parental
 2 rights of Ameena's mother. And I should add that Ameena's
 3 mother was represented by counsel at that proceeding and
 4 Ameena's mother's attorney said that Ameena's mother Charia had
 5 no objection to our being in the court but the Judge -- as I
 6 said, the judge said we could not be in court.

7 The other proceeding was a review of the placement of
 8 Ameena which is known as a permanency hearing, at which point
 9 during a permanency hearing the family court judge has the
 10 jurisdiction to make various orders as to what will happen to
 11 the child.

12 We don't know what orders the judge made because we
 13 weren't even permitted to be present in the court.

14 It was an opportunity, had the Court permitted
 15 Ms. Haynes to intervene and permitted Ms. Haynes to raise her

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16 claims the family court could have, at that time, made some
 17 kind of an order including an order that Ameena should reside
 18 with Ms. Haynes.

19 THE COURT: So, the second proceeding you described
 20 was about foster care, right?

21 MS. KUBITSCHKEK: Correct. The foster care of Ameena.
 22 What will happen to Ameena in the immediate future while the
 23 case determining Ameena's mother's parental rights continues.

24 THE COURT: If the parental rights are terminated
 25 then -- because I have a vague memory, then there is an issue

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65N5HAYA argument
 1 about adoption, right?

2 MS. KUBITSCHKEK: That's correct.
 3 If the parental rights are terminated and -- by the
 4 way, we have spoken with Ameena's mother's lawyer and Ameena's
 5 mother's lawyer says that Ameena's mother does not want her
 6 parental rights to be terminated and she will defend the
 7 case -- Ameena's mother will defend the case and the attorney
 8 will defend the case zealously.

9 So, it is not clear that the mother's rights will be
 10 terminated.

11 If the mother's rights are terminated, then Ameena
 12 will be available for adoption and the person who will have
 13 preference in filing an adoption petition is the foster parent
 14 who has had Ameena for one year. That's a statutory
 15 preference.

16 THE COURT: well, just review the. The child was
 17 removed from Ms. Haynes when?

18 MS. KUBITSCHKEK: June 20th, I believe, 2005. June
 19 10th, 2005. Not quite one year ago.

20 THE COURT: And you came to the federal court when?

21 MS. KUBITSCHKEK: We came to the federal court in
 22 February of 2006 after Ms. Haynes had attempted to exhaust her
 23 administrative remedies.

24 THE COURT: The federal action was started again,
 25 please?

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65N5HAYA argument

1 MS. KUBITSCHKEK: February 2006.

2 THE COURT: February 2006.

3 MS. KUBITSCHKEK: In between the removal and the
 4 federal court Ms. Haynes initially challenged the removal and
 5 she was --

6 THE COURT: Challenged it where?

7 MS. KUBITSCHKEK: With the City. That was the first
 8 step in the procedure set up by the state.

9 She had a meeting which was characterized as an
 10 independent review where an employee of the City allowed
 11 Ms. Haynes to say her peace but not to cross-examine any other
 12 witnesses and then determined that Ameena should not return to
 13 Ms. Haynes.

14 Ms. Haynes then had the right to an administrative
 15 hearing before the State Office of Children and Family
 16 Services. She immediately availed herself of that right
 17 however the state did not schedule a hearing until November
 18 30th of 2005. Ms. Haynes participated in that hearing. She
 19 won the hearing to the extent that the --

20 THE COURT: She what?

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21 MS. KUBITSCHek: She won. She prevailed, to the
22 extent --
23 THE COURT: The hearing was held in November?
24 MS. KUBITSCHek: November 30th, 2005.
25 THE COURT: Was there a decision from that hearing?
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65N5HAYA argument

1 MS. KUBITSCHek: Not until February 7th of 2006.
2 THE COURT: That decision came from whom?
3 MS. KUBITSCHek: The State Office of Children and
4 Family Services, the commissioner is John Johnson, who is a
5 defendant in this case.
6 THE COURT: I'm sorry. I was making a note. The
7 decision was by whom?
8 MS. KUBITSCHek: John Johnson's designee, whose name
9 was John Udochi. U-D-O-C-H-I.
10 THE COURT: Is John Johnson an administrative judge of
11 some kind?
12 MS. KUBITSCHek: Johnson is the Commissioner of
13 Children and Families of the State of New York. He is --
14 THE COURT: who actually held the hearing?
15 MS. KUBITSCHek: The hearing was held before an
16 administrative law judge named Judge Farrow. F-A-R-R-O-W.
17 THE COURT: Did Judge Farrow issue some kind of a
18 ruling?
19 MS. KUBITSCHek: Judge Farrow issued a recommended
20 decision which we have not been permitted to see. She issued
21 that decision to John Udochi, who is the Commissioner of
22 Commissioner Johnson --
23 THE COURT: How do you spell Udochi?
24 MS. KUBITSCHek: U-D-O-C-H-I.
25 THE COURT: And Udochi is male or female?
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8

65N5HAYA argument

1 MS. KUBITSCHek: Farrow is female.
2 THE COURT: Udochi.
3 MS. KUBITSCHek: Udochi issued decision on February
4 7th.
5 THE COURT: what is his or her title?
6 MS. KUBITSCHek: His title, special hearing officer, I
7 believe. He is in fact -- he stands in the shoes of the
8 commissioner who is -- the commissioner is equivalent of a
9 cabinet member for the State of New York.
10 THE COURT: The commissioner's name again?
11 MS. KUBITSCHek: John Johnson.
12 THE COURT: So what was the outcome of the state
13 proceeding?
14 MS. KUBITSCHek: The outcome of the state
15 administrative hearing was that the state commissioner
16 determined that it was arbitrary, capricious and wrong to
17 remove Ameena from Ms. Haynes.
18 THE COURT: who determined that, Udochi?
19 MS. KUBITSCHek: Udochi's determination.
20 THE COURT: Wrong to remove.
21 MS. KUBITSCHek: And in fact arbitrary. That there
22 was no reason whatsoever to remove her.
23 THE COURT: All right.
24 MS. KUBITSCHek: The commissioner stopped short of
25 ordering the wrong to be corrected and said that the City of
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9

65N5HAYA argument

1 New York must do an independent evaluation, underlined the term
2 "independent," and to determine what should happen to Ameena
3 now because so much time has elapsed from the removal on June
4 10th up until the decision on February 7th of 2006.

5 THE COURT: And did the City do that?

6 MS. KUBITSCHK: The City did not do that. The City
7 did a new evaluation but it was by no means independent, it was
8 the same people who had decided to remove Ameena who then
9 submitted a report on April 4th of 2006, which this Court has a
10 copy of.

11 THE COURT: I'm sure I do. Just refresh my memory.
12 The report was April what?

13 MS. KUBITSCHK: April 4th of 2006, just before oral
14 argument.

15 The report was basically --

16 THE COURT: Who issued the report?

17 MS. KUBITSCHK: The City of New York Administration
18 for Children's Services, again a defendant in this case, and
19 they were defendants in the case at the time they prepared the
20 report and at the time they issued the report.

21 THE COURT: Then the report said what again?

22 MS. KUBITSCHK: The report says that Ameena should
23 remain where she is, that is, in the foster home of a stranger
24 who is referred to in the report as Ms. T. That's her initial.

25 And the report purports to compare the relative

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65N5HAYA argument

1 abilities of Ms. T and Alice Haynes to care for 4-year-old
2 Ameena. The report does not mention at all the fact that
3 Ms. Haynes is family, that Ms. Haynes has a strong bond with
4 Ameena, that Ameena has said that she wants to return to live
5 with Ms. Haynes.

6 The report does not consider the family relationship
7 at all. The report does not consider the constitutional
8 relationship at all. It is pretty much essentially a beauty
9 contest between Ms. T, who they say is better, physically able
10 to care for Ameena and Ms. Haynes, who they say is less well
11 able to care for Ameena physically.

12 THE COURT: Well, I relied on that report, did I not?

13 MS. KUBITSCHK: Yes, your Honor, you did rely on that
14 report. And we think that and the one -- the primary reason
15 that we made the motion to reargue was that Ms. Haynes disputes
16 more than two dozen statements in this report. Ms. Haynes
17 submits that they are either untrue or misleading or
18 insufficient.

19 For example, the social worker who wrote the report
20 spent hours and hours observing Ameena in the home of the other
21 foster mother, Ms. T. That same social worker didn't observe
22 Ms. Haynes with Ameena not even once. So, to say that Ameena
23 is bonded to Ms. T and imply that Ameena is not bonded to
24 Ms. Haynes is simply incorrect.

25 Secondly, the report which says that Ms. Haynes

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11

65N5HAYA argument

1 cannot -- has physical difficulties, that report is based upon

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2 a report which we don't have which we are not permitted to see,
 3 by a physician named Jonathan Horwitz. H-O-R-W-I-T-Z.
 4 Dr. Horwitz, we have learned, is a pediatrician. He
 5 has never seen or examined Ms. Haynes yet he, apparently,
 6 according to the City of New York, he felt capable of drawing
 7 conclusions as to her ability to function as a caretaker. In
 8 fact, he said she would have difficulty functioning as a
 9 caretaker based upon the medical records which he had reviewed
 10 not based on any examination.

11 THE COURT: How old is Ms. Haynes?

12 MS. KUBITSCHKEK: Ms. Haynes is 66. The other foster
 13 mother is 58. They are not that far apart in age. Roughly the
 14 same age.

15 The Dr. Horwitz --

16 THE COURT: Does anybody have a transcript of the
 17 decision I dictated?

18 MS. KUBITSCHKEK: Yes, your Honor. I have a transcript
 19 right here.

20 Your Honor, as your Honor may recall, Ms. Haynes had
 21 leg surgery and Dr. Horwitz makes a lot of this leg surgery, as
 22 did the City, that this leg surgery would somehow be
 23 incapacitating. We provided a report from the surgeon who said
 24 that Ms. Haynes would be fine. And, as soon as Ms. Haynes was
 25 back on her feet, we got a report from Ms. Haynes' own doctor

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65N5HAYA argument

1 which we presented to this Court in the motion to reargue that
 2 Ms. Haynes is in fact quite capable of taking care of Ameena,
 3 of taking care of a 4-year-old.

4 THE COURT: Just a minute, please.

5 (Pause)

6 THE COURT: All right, I have reviewed that ruling I
 7 made. Mr. Charney said there would be an appeal. I take it
 8 there wasn't any appeal?

9 MS. KUBITSCHKEK: Your Honor, we discussed it in the
 10 office and thought that it was more appropriate to make motion
 11 for reargument rather than to appeal immediately. And as the
 12 Court is aware, filing a motion for reargument stops the clock
 13 for motions.

14 THE COURT: And this is your motion for reargument.

15 MS. KUBITSCHKEK: This is our motion for reargument.

16 The subsequent events only reinforced that reargument
 17 or renewal was necessary in that Ms. Haynes, despite the fact
 18 that the defendants said that they would let Ms. Haynes -- they
 19 would agree to Ms. Haynes being heard in the family court; when
 20 she actually went to the family court they wouldn't agree and
 21 the family court says you have no right --

22 THE COURT: I don't refer to that in my ruling. It
 23 doesn't mean there weren't the assurances you're talking about
 24 but.

25 MS. KUBITSCHKEK: That's correct, your Honor. The

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65N5HAYA argument

1 assurance, the fact is that Ms. Haynes now has no other
 2 remedies. Because the other thing that the defendants said
 3 were, well, if Ms. Haynes is upset with the report of April
 4 4th, which is what the City was ordered to produce on February
 5 2nd, the state ordered the City to produce the report; if
 6 Ms. Haynes was upset with the report and disagreed --

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7 THE COURT: The ACS report.
 8 MS. KUBITSCHKE: -- the ACS report, if she disagreed
 9 with the factual statements in the report she could be heard.
 10 And so Ms. Haynes said, okay, I will try to be heard. We
 11 requested an administrative hearing with the state which is the
 12 remedy that the state provides for former foster parents who
 13 are aggrieved by actions of the City. This was an action of
 14 the City refusing to return Ameena to Ms. Haynes on February
 15 7th of 2006, as I said.

16 As I said, the state said it was wrong to remove
 17 Ameena from Ms. Haynes and we want a report from the City. On
 18 April 4th of 2006 they got the report from the City and the
 19 City says we have decided not to return Ameena to Ms. Haynes.
 20 Ms. Haynes said I need to be able to challenge this somehow and
 21 so, she sought an administrative review. She sought to take
 22 advantage of administrative remedies which the state provides
 23 and yesterday afternoon we received a letter from the state
 24 which this Court has a copy of saying there will be no
 25 administrative hearing.

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65N5HAYA argument

1 So that Ms. Haynes now is in the situation where --
 2 THE COURT: It seemed to me that, frankly, that that
 3 is a problem. Ms. Haynes had a right to go to the state,
 4 correct?

5 MS. KUBITSCHKE: Ms. Haynes, when Ameena was removed
 6 Ms. Haynes had a right to go to the State after she had gone to
 7 the City.

8 THE COURT: All right, but she had a right to go to
 9 the State.

10 MS. KUBITSCHKE: Correct. She went to the State.

11 THE COURT: And I take it Mr. Kraft, you agree, she
 12 had a right at that time to go to the state, right?

13 MR. KRAFT: At the time of the removal; yes, Judge.

14 THE COURT: Now, the problem I have is that the state
 15 did not really resolve the matter. The State left an open
 16 question and the State said that there should be a review, an
 17 evaluation by the ACS, all right? The ACS made a report and it
 18 seems to me the State should have finished its work, that the
 19 City should not be in this process the final word. And I don't
 20 understand the State not completing its job.

21 MR. KRAFT: Well, with all due respect, Judge, I can
 22 explain that.

23 The letter that was sent to Ms. Haynes' counsel and
 24 also to other counsel in this case explained that the State was
 25 doing what good administrative law agencies are supposed to do

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15

65N5HAYA argument

1 which is look to what their jurisdiction is. They're not in
 2 the nisi prius court.

3 THE COURT: Nobody says that. They undertook to
 4 review the removal, right?

5 MR. KRAFT: Yes, and they resolved that.

6 THE COURT: And they didn't have a hearing until
 7 November 30 which is, you know, it is arguably not really very
 8 good due process to wait that long, but they did and they had
 9 this hearing and they found it was wrong to remove.

10 Now, any kind of due process would involve a
 11 consideration of what the remedies should be. I mean, that is

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12 so obvious it is so obvious it is unarguable. And so, the
13 State issued this statement saying it was wrong to remove.
14 Very nice. Is it an academic statement? Is it a statement of
15 theory? Is it a statement of history?

16 Ms. Haynes was not up there to get a historical
17 analysis. She was up there to get a remedy. I assume the
18 State would have had the power -- maybe I'm wrong, would the
19 State have had the power to say she should be returned to
20 Ms. Haynes?

21 MR. KRAFT: The State can say in its decision that the
22 removal is wrong.

23 THE COURT: They can do that.

24 MR. KRAFT: Yes, but the State does not have custody
25 of the child., the City does. The difference between the State
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16

65N5HAYA argument

1 administrative remedy and the family court is the family court
2 can order the City where to place the child. The State can
3 make a decision --

4 THE COURT: Wait a minute. Wait a minute.

5 MR. KRAFT: -- but it can't order the City where to
6 place the child.

7 THE COURT: It doesn't help to get off onto the family
8 court right now.

9 Let's just suppose that the State had done a good job
10 and had its hearing, let's say, in late June of last year,
11 okay? Assume that, and let's assume that the State had
12 found -- I'm just asking you if the, does the State have
13 jurisdiction? If they find that the removal is wrong does the
14 State have jurisdiction to deliver any remedy at all?

15 MR. KRAFT: As my client understands its jurisdiction,
16 it has the right to determine that a removal was either correct
17 or incorrect and the City, after receiving a decision of an
18 incorrect removal, would then have the option of putting the
19 child back or not. The State does not believe it can order the
20 placement of a child in City custody in any particular
21 location.

22 THE COURT: Let me just follow that. The State has
23 jurisdiction to review what the City has done, right?

24 MR. KRAFT: What the City or sometimes an authorized
25 agency on the City's behalf has done, yes.

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17

65N5HAYA argument

1 THE COURT: And this time it is the City, right?

2 MR. KRAFT: Correct. Correct.

3 THE COURT: The reason for going to the State, why
4 does the State even have this jurisdiction? what is the
5 purpose?

6 MR. KRAFT: Because when a child is removed from
7 foster care, the foster parent is losing an income stream and
8 the Section 400 hearing is a chance for a foster parent to try
9 to convince the State that she should keep her job, which is
10 the job of raising a child as foster parent.

11 That's the purpose of a Section 400 hearing.

12 THE COURT: Well, and you are telling me that, I
13 assume, that there have been many hearings of this kind, right?

14 MR. KRAFT: I don't know how many there have actually
15 been, Judge. There certainly have been a few. A few of them
16 have been in front of your Honor, so.

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17 THE COURT: No, I'm not talking about court hearings,
18 I'm talking about hearings before --
19 MR. KRAFT: Yes, there have been hearings about this
20 section, Judge.
21 THE COURT: By the State agency?
22 MR. KRAFT: Yes.
23 THE COURT: Are you telling me that in no instance has
24 this state agency, in one way or another, affected the return
25 to the person who is claiming that their livelihood has been
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18

65N5HAYA argument
interfered with?

1
2 MR. KRAFT: There was one that I know of, not
3 personally, but I know of because of a reported case where the
4 State ordered the return of a foster parent. It wound up being
5 the matter of Shanice H. I think it was. It is an appellate
6 division case. I can get you the cite if you need it.
7 It is an instructive case, actually, because the State
8 ordered the return of a foster child to a foster parent after
9 determining that a removal was wrong. The law guardian
10 objected. The law guardian didn't want this child going back
11 to the foster parent so the law guardian went to family court.
12 The family court said, well, I can't overturn a decision after
13 fair hearing.
14 The decision said to put the child back with this
15 foster parent so we are going to do that. The law guardian
16 appealed and the appellate division scolded the family court
17 and said, shame on you. The State decision after fair hearing
18 doesn't place the child, you do. The family court has the
19 ultimate power to place children. The State can determine
20 whether a removal was wrong but the State is not, cannot place
21 children, the family court does.
22 That's why I referred to the family court earlier,
23 Judge.
24 THE COURT: All right, but let's then take that and
25 apply that to this case. I can surely understand why you

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19

65N5HAYA argument

1 referred to the family court. Here, of course, the State
2 didn't say to Ms. Haynes go to the family court.
3 Right?
4 MR. KRAFT: Correct. The state did not say that.
5 THE COURT: The state sent it back to the City for an
6 independent determination based on current circumstances,
7 right?
8 MR. KRAFT: Correct.
9 THE COURT: Okay.
10 Now, should the state have sent it to the family
11 court?
12 MR. KRAFT: I don't believe the state is authorized to
13 do that. I believe the Section 400 of the Social Services Law
14 only authorizes the State to determine whether the removal is
15 right or wrong. And it did that.
16 THE COURT: But it did more than that, it sent it back
17 to the City to do something, right?
18 MR. KRAFT: Yes, it did.
19 THE COURT: And, obviously, it would have been quite
20 out of order for Ms. Haynes to go into the family court to
21 seek -- it would be nonsense for her to go into family court at

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22 that time to seek some remedy, right?
 23 MR. KRAFT: I don't think she would have had success
 24 in family court had she done that.
 25 THE COURT: It would have been out of order so she --
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20

65N5HAYA argument
 1 there was this so-called independent review by the ACS,
 2 something done at the request of the state, right?
 3 MR. KRAFT: Correct.
 4 THE COURT: Now, the ACS report states that the child
 5 should be with the new foster parents and not go back to
 6 Ms. Haynes, right?
 7 MR. KRAFT: Correct, that's what it says.
 8 THE COURT: Now, does the City have the power, at this
 9 juncture, to make that determination?
 10 MR. KRAFT: Yes, it does.
 11 THE COURT: Is that determination final without any
 12 right of review by anybody?
 13 MR. KRAFT: No. It is plaintiff asked for a hearing
 14 which decision was, request was denied, as Ms. Kubitschek said.
 15 So that, under New York Law, makes the City's determination a
 16 final determination. There is no administrative review of that
 17 and so Ms. Haynes' remedy is an Article 78 proceeding in State
 18 Supreme Court and the State Supreme Court would have the power
 19 to order the City to do something different if it believes that
 20 the report is arbitrary or capricious.
 21 THE COURT: Well, I'm wondering if, according to what
 22 you said earlier in bringing up the family court, I wonder if
 23 the remedy would not be in the family court.
 24 MR. KRAFT: Judge, I have to say, this law, the law in
 25 this area is not very neat. But right now Ms. Haynes' remedy
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21

65N5HAYA argument
 1 as the former foster parent, a person who feels aggrieved by
 2 the City's determination, is in the Supreme Court.
 3 The Supreme Court is New York's court of general
 4 jurisdiction. If a Supreme Court Judge wants to, he or she can
 5 take a matter that would otherwise be in family court or refer
 6 a matter to family court.
 7 I mean, the Supreme Court is our court of widest
 8 jurisdiction and can resolve issues like this created by the
 9 complicated legislation.
 10 THE COURT: Well, let's go back. Let's suppose that
 11 the state agency -- what is the name of the state agency?
 12 MR. KRAFT: The Office of Children and Family
 13 Services, OCFS.
 14 THE COURT: OCFS?
 15 MR. KRAFT: OCFS. Office of Children and Family
 16 Services.
 17 THE COURT: Let's suppose that the OCFS had not
 18 directed an independent review by the City and it just said
 19 there was improper removal. Because at one point you said
 20 that's really what they have jurisdiction to do, right?
 21 MR. KRAFT: Correct.
 22 THE COURT: Now, let's suppose that they had just done
 23 that and no more. I think you indicated that the reason they
 24 don't do any more is because it is up to the family court to
 25 decide where children should be placed.
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22

65N5HAYA argument

1 You told me that, did you not?

2 MR. KRAFT: Yes, I did.

3 THE COURT: Now, it would follow, would it not, that
4 if the OCFS had simply made a finding of improper removal and
5 nothing more, then if anybody wanted to have the child moved
6 they would have gone to family court, right?

7 MR. KRAFT: You would think so, but the family court
8 in the State of New York is a court of limited jurisdiction.
9 And the problem that Ms. Haynes has and any person in her
10 situation is that they can't bring a proceeding in family court
11 unless they have a specific right to be there under the Family
12 Court Act. And she wouldn't have one and that's why I
13 suggest --

14 THE COURT: Why wouldn't she have one?

15 MR. KRAFT: Because, as I understand it, there is no
16 provision that specifically says that former foster parents can
17 bring proceedings in family court to have children returned to
18 them.

19 THE COURT: But I want to follow. Let's assume that
20 the OCFS had simply issued a ruling that the removal was
21 improper, period. Nothing more. Now, at that moment does
22 someone in Ms. Haynes' position have no remedy?

23 MR. KRAFT: I believe her remedy at that moment would
24 be the one I mentioned earlier, that she can take either
25 government agency, either the City or the Office of Children

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23

65N5HAYA argument

1 and Family Services, into Supreme Court through the Article 78
2 proceeding.

3 Our Article 78 is the way citizens can bring a
4 complaint against a government agency for almost anything that
5 they believe the government agency is doing incorrectly. And
6 since we have limited jurisdiction in the family court,
7 Ms. Haynes and people in her position would bring Article 78
8 proceedings. And they can do that.

9 Ms. Haynes can, if she wants to, still bring an
10 Article 78 proceeding about the February decision after hearing
11 if she thinks that was incorrectly decided by the state. She
12 can bring that.

13 She can certainly bring an Article 78 proceeding about
14 the recent decision of the State not to give her a fair
15 hearing. Maybe the Supreme Court will say, yes, State, you're
16 wrong in interpreting your jurisdiction that way. You should
17 give her a fair hearing.

18 She can bring an Article 78 hearing about the City's
19 April 4th report and claim that it is arbitrary and capricious
20 I mean, that is the procedure in New York State practice to
21 address your complaints against the government even though, as
22 a matter of common sense, it might be best if she could go
23 straight to family court. Since she can't, that's the remedy
24 open to her and her counsel.

25 THE COURT: What would you say to that,

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24

65N5HAYA argument

1 Ms. Kubitschek?

2 MS. KUBITSCHKEK: Several things, your Honor.

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3 First and foremost, that when there are Constitutional
4 issues at stake as there are in this case, that an individual
5 has the right to go into federal court and the federal court
6 has jurisdiction to hear those constitutional issues. The
7 person does not have to exhaust state court remedies prior to
8 going into federal court.

9 And as you know, your Honor, if the person chooses to
10 go into state court, then the person is forever precluded from
11 going into federal court under the Rooker-Feldman Doctrine.

12 So, Ms. Haynes has the right, because this is a family
13 relationship, she has a Constitutionally protected liberty
14 interest in her grand-niece Ameena, she has the right to ask
15 this Court to vindicate her rights. She does not have to
16 exhaust state judicial remedies.

17 THE COURT: Okay, I'm sure you are right on that, but
18 the thing that was the basis for my ruling, the main ruling
19 denying the motion was my belief that at this juncture I could
20 not make a decision simply based on the fact -- and I found it
21 as a fact -- that there was a denial of due process in the
22 removal.

23 I was of the view that any consideration of a remedy
24 would need to take into account the kinds of circumstances
25 which were discussed in the April 4, 2006 report by the ACS and

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25

65N5HAYA argument

1 that would involve having a trial, basically, about those
2 issues; and Ms. Haynes challenges the factual findings in the
3 April 4, 2006 report.

4 But, let me ask you this. Do you take the position
5 that the federal court can order the child's return to
6 Ms. Haynes simply on the basis of the original lack of due
7 process in connection with the removal?

8 MS. KUBITSCHKE: We take the position, your Honor,
9 that the state may not separate a child --

10 THE COURT: No, no. I asked a very simple question.

11 MS. KUBITSCHKE: Okay.

12 THE COURT: And you know the meaning of it. I found
13 in that ruling that there was a denial of due process in
14 connection with the original removal, right?

15 MS. KUBITSCHKE: Correct.

16 THE COURT: Now, do you take the position that that,
17 in and of itself, without considering anything further, should
18 result in this court ordering the return of the child to
19 Ms. Haynes?

20 MS. KUBITSCHKE: Not in and of itself; no, your Honor.

21 We take the position that a child and family member
22 have the Constitutional right to be together unless the family
23 member is unfit or the state has some other compelling interest
24 in separating them. One compelling interest could be that if
25 the state came here and said we propose to send Ameena back to

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65N5HAYA argument

1 her mother, the mother has now been rehabilitated and can take
2 care of her, then Ms. Haynes would not have an interest in
3 getting Ameena back and then this Court would properly say
4 Ameena cannot be reunited.

5 The government could say that there is some other
6 compelling interest, that is, something has happened between
7 June of last year and today which demonstrates conclusively

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8 that Ms. Haynes is so unfit as a caretaker that she, Ameena,
 9 cannot be returned to her because it would be dangerous to
 10 Ameena.

11 THE COURT: That's virtually the kind of thing that
 12 the Court would have to find in order to take a child from a
 13 parent.

14 MS. KUBITSCHKE: That is correct. The law is clear,
 15 we submit, that to interfere with the family relationship the
 16 government must have a compelling state interest.

17 THE COURT: See, one of the things I ruled in that
 18 earlier ruling was really rejecting your current argument, I
 19 addressed that. I addressed the argument that Ms. Haynes
 20 basically had the right of a parent and that only the kind of
 21 very exceptional circumstances which would justify removal from
 22 a parent could be used to justify the removal from and the
 23 continued removal from Ms. Haynes.

24 I rejected that idea. I said Ms. Haynes has an
 25 interest but I did not feel that that interest was the interest

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65N5HAYA argument

1 that was equivalent to that of a parent. So, I have ruled
 2 that. And if that is your position now, I had no intention of
 3 departing from what I ruled in the original decision.

4 So, if that's what we are really dealing with, then
 5 that's the end of the application for reconsideration because I
 6 do not accept that proposition now any more than I did at the
 7 time of the original decision.

8 MS. KUBITSCHKE: Your Honor, that is certainly not
 9 everything that we are dealing with.

10 THE COURT: What else are you talking about?

11 MS. KUBITSCHKE: What we are talking about is, number
 12 one, if the standard is something less than Ms. Haynes'
 13 fitness, it must be something more than hearsay statements of
 14 an agency with an interest in this case, which Ms. Haynes has
 15 now absolutely no chance whatsoever to refute.

16 The statement by a non-examining doctor, by a
 17 pediatrician that Ms. Haynes couldn't care for a child, number
 18 one, has been refuted by the fact --

19 THE COURT: Wait a minute. Wait a minute. This gets
 20 me into what I talked about. This was my ultimate ruling, that
 21 I felt that it would not be a proper activity by a federal
 22 court in dealing with a constitutional claim to get into a
 23 trial of the relative capability, the relative merit, the
 24 relative benefit of Ms. Haynes as a foster parent versus the
 25 new people as foster parents.

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65N5HAYA argument

1 That, it seemed to me, was going way beyond my proper
 2 function in dealing with Constitutional questions. And I still
 3 am of that view. I would have to hold a trial and witnesses
 4 would come in. I would be holding a trial about one foster
 5 care situation versus another foster care situation and that is
 6 not what I believe I have any power to do as a federal court.

7 Now, what I do have the power to do is to see that
 8 there is due process on the State and City side. That
 9 certainly becomes an issue because it is very clear that the
 10 original removal was a violation of the Federal Constitution.

11 Now, if the City and State authorities -- let me just
 12 interrupt myself.

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13 Ms. Haynes resorted to administrative remedies, she
 14 did not immediately come into the federal court. If she had
 15 come into the federal court on June 30th or something, maybe
 16 the federal court would have ordered the return of the child.
 17 She didn't come in.

18 Whether she was required to exhaust the administrative
 19 remedies, she did resort to administrative remedies and so one
 20 view is this: Once she resorts to the state administrative
 21 remedies, then that's the end of the matter as far as a federal
 22 court is concerned. And that's certainly an arguable view,
 23 that the original removal, that Constitutional problem is over
 24 with.

25 She's now gone the way of the state administrative
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65N5HAYA argument
 1 remedies. I don't quite believe that, and it seems to me
 2 that -- although, I think maybe there was a question about
 3 whether I have jurisdiction to do what I am talking about now,
 4 I will say it: It seems to me that the State had an
 5 obligation, under the Constitution, once having improperly
 6 removed her, the child, to provide a process which would
 7 involve a proper remedy for that. The child had been
 8 improperly removed. The City and state held out that they had
 9 a remedy for that. That's what she was seeking. They held out
 10 they had a remedy. It seems to me they have to provide a due
 11 process remedy.

12 Have they done that?

13 MS. KUBITSCHKEK: No, your Honor. They have not --

14 THE COURT: Well, wait a minute. I think it is highly
 15 questionable that the remedy was sufficient when the State did
 16 not have a hearing until November 30.

17 MS. KUBITSCHKEK: And plaintiff agrees. And the
 18 Seventh Circuit in the case of Dupuy against Samuels also
 19 agreed when she said --

20 THE COURT: Wait a minute. I mean, that's really
 21 quite outrageous, that the state -- wait a minute.

22 Right after the removal you said this -- and I have
 23 just forgotten, I didn't make complete notes -- what did
 24 Ms. Haynes do right after the removal? Did she go to the City?

25 MS. KUBITSCHKEK: Yes, she did.

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65N5HAYA argument
 1 And by the way, your Honor, the statute provides for a
 2 pre-removal conference called an independent review.

3 THE COURT: I know that.

4 MS. KUBITSCHKEK: But they violated that statute and
 5 violated due process of law because they removed Ameena.

6 THE COURT: What did she do after removal?

7 MS. KUBITSCHKEK: She requested her independent review,
 8 which was held, and a decision was made on June 24th -- I'm
 9 sorry, July 11th. The independent review meeting was held on
 10 June 24th and the decision was made on July 11th.

11 THE COURT: July 11, and that was ACS.

12 MS. KUBITSCHKEK: That was ACS.

13 THE COURT: Now, look. And then did she, right away,
 14 ask for a fair hearing?

15 MS. KUBITSCHKEK: Yes, your Honor. She did. And the
 16 state delayed in scheduling the fair hearing.

17 THE COURT: Okay, I would say that is basically a

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18 violation of due process to delay that long, because then it
 19 gives everybody an opportunity to say, well, we have got to
 20 worry about the current circumstances. Well, the state has
 21 made the current circumstances, something that involves months
 22 and months later.

23 Wait a minute, Mr. Kraft. I will hear you in a while.

24 And then, when what was needed was a hearing on the
 25 facts, not an appellate hearing but a hearing on the facts

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65N5HAYA argument

1 where the evidence could be presented, whatever about the
 2 removal, I think it would be in order to take evidence about
 3 some appropriate body to take evidence about the relative merit
 4 of Ms. Haynes versus the new foster parents.

5 I cannot see that that's irrelevant.

6 MS. KUBITSCHKEK: Your Honor, in fact there was --

7 THE COURT: Wait a minute.

8 MS. KUBITSCHKEK: I'm sorry.

9 THE COURT: But recognizing that if this hearing had
 10 occurred in a timely manner, for instance in July, then what
 11 you would really be concentrating on is Ms. Haynes. There
 12 wouldn't be a lot of time going by where she is with this
 13 second home.

14 So, the delay until November 30 was really very, very
 15 bad and unless maybe Ms. Haynes, maybe she asked for
 16 adjournments and all that.

17 MS. KUBITSCHKEK: She did not, your Honor.

18 THE COURT: Look. The problem is that there really
 19 should have been a hearing, a fair hearing about Ms. Haynes and
 20 her care and that should have happened promptly after the
 21 removal on June 10.

22 What did the ACS report of July 11 find?

23 MS. KUBITSCHKEK: The ACS report of July 11th found
 24 that Ameena should not go back to Ms. Haynes.

25 THE COURT: All right.

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65N5HAYA argument

1 MS. KUBITSCHKEK: Despite the fact, your Honor, that
 2 any conceivable reason --

3 THE COURT: Despite any conceivable reason they found
 4 she should not go back.

5 Had she been placed in the new foster home by then?

6 MS. KUBITSCHKEK: Yes, your Honor, she had.

7 THE COURT: Did they compare Ms. Haynes with the new
 8 foster home?

9 MS. KUBITSCHKEK: No. No, they didn't.

10 THE COURT: They just criticized Ms. Haynes.

11 MS. KUBITSCHKEK: They criticized Ms. Haynes.

12 THE COURT: All right. Well see, it seems to me
 13 that's the issue which should have been addressed in the fair
 14 hearing and it should have been done promptly.

15 MS. KUBITSCHKEK: Your Honor --

16 THE COURT: Let me continue.

17 And by the time of this terribly, terribly delayed
 18 thing conducted by the state beginning on November 30 with a --
 19 incidentally, when did the -- and no decision until February 7,
 20 2006. This is just an impossible procedure.

21 MS. KUBITSCHKEK: We agree.

22 THE COURT: Absolutely terrible.

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23 And then, really then sending it back to the City who
24 had done the misdeed in the first place and then, according to
25 Mr. Kraft nothing but an appellate remedy available, not a
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65N5HAYA argument
1 remedy before a fact-finder, not a remedy before somebody who
2 will, some agency or Court who will take the evidence, pro and
3 con. This is not due process.
4 And the question before the Court is what does this
5 Court do? Because I don't think that it is a very good idea
6 for this Court to become the fact finder or the trier of the
7 fact. In a way that should be done, that should be done by a
8 State or City entity but they haven't done it.
9 Mr. Kraft has been trying to get up so I will hear
10 Mr. Kraft.
11 MR. KRAFT: Judge, I just wanted to point out, as Paul
12 Harvey likes to say, the rest of the story about the fair
13 hearing.
14 The fair hearing actually started in October and the
15 City and Ms. Haynes, who was at that time not represented,
16 appeared at the hearing. I have provided the transcript to
17 plaintiff's counsel as discovery.
18 The City asked for an adjournment because one of its
19 witnesses was not available. The ALJ asked Ms. Haynes if she
20 would consent to the adjournment. She said yes. And most
21 important, during the adjourned period is when she got this
22 counsel.
23 So, Ms. Haynes used the adjournment to her advantage
24 and got counsel who has been --
25 THE COURT: When in October did it start?
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65N5HAYA argument
1 MS. KUBITSCHKE: October 27th, your Honor.
2 THE COURT: That's just as bad as November 30.
3 MR. KRAFT: It is not much better, Judge.
4 THE COURT: It is pretty bad.
5 MR. KRAFT: It could be better, Judge.
6 THE COURT: I am going to have a trial. I will hear
7 the evidence; whatever is relevant, whatever evidence is
8 relevant to the remedy. The trouble is I have got to refer it
9 to a Magistrate Judge because I'm gone for June and July and
10 this should be done as quickly as possible.
11 But if you would submit an order I will grant the
12 motion for reconsideration, to the extent that I'm directing
13 that a hearing be held. You can specify the issues. That
14 order can be settled by the end of the week because Friday is
15 the last day I will be in the office until August.
16 That's what we will do. And otherwise, I'm not at all
17 satisfied that due process is provided by going to the
18 appellate division and an Article 78 proceeding. The appellate
19 division does not take testimony of witnesses and that's what
20 is needed.
21 So, I have to adjourn now. That's my ruling and you
22 will submit an order and thank you very much.
23 MS. NEUSTAETTER: Excuse me, your Honor?
24 THE COURT: Yes.
25 MS. NEUSTAETTER: The appellate division does not here
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65N5HAYA argument

1 an Article 78 proceeding. Article 78 proceeding is in the
 2 Supreme Court, which is the lower court and which does hear
 3 testimony. I just wanted to clarify that.

4 THE COURT: Well, I guess a made a huge, huge, huge
 5 mistake.

6 MS. KUBITSCHKE: No, your Honor. You were absolutely
 7 correct, because the Article 78 of the CPLR says that a
 8 proceeding is brought in the Supreme Court. However, if there
 9 are evidentiary issues, that is, if there is a dispute about
 10 the facts, then the proceeding must be transferred to the
 11 appellate division so that the case then goes directly to the
 12 appellate division.

13 THE COURT: Let me go back.

14 MS. KUBITSCHKE: And there is no testimony.

15 THE COURT: Wait a minute. Wait a minute. Maybe my
 16 mistake wasn't as bad as I thought.

17 Obviously an Article 78 proceeding does go to the
 18 Supreme Court, but it is my impression that an Article 78
 19 proceeding is a review proceeding. And so, I will confess
 20 right now that I don't have a precise knowledge of Article 78
 21 proceedings, but I would be most surprised if I were to learn
 22 that in an Article 78 proceeding the kind of trial that I
 23 envision here would be held with issues of fact presented and
 24 with examination of witnesses and cross-examination of
 25 witnesses and that kind of thing.

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65N5HAYA argument

1 Now, if I'm wrong and if that will go on in an Article
 2 78 proceeding, then I have got to rethink what I just did.

3 Let me ask Ms. Neustaetter, in an Article 78
 4 proceeding does the Court hear testimony of witnesses,
 5 examination and cross-examination and treat the matter, do
 6 they -- this is really a trial de novo. This is a trial de
 7 novo I'm talking about, not a review and an Article 78
 8 proceeding is a trial de novo.

9 MS. NEUSTAETTER: Mr. Kraft would like to answer that,
 10 your Honor.

11 THE COURT: All right.

12 MR. KRAFT: Judge, it depends on what the Judge does.
 13 In an Article 78 it depends on what is before the Court.

14 Ms. Kubitschek is correct if what's before the Court
 15 is a hearing with a record already, the Court kicks it up to
 16 the appellate division. If the Article 78, though, is on the
 17 arbitrary and capriciousness of the City's April 4th report,
 18 for example, the judge would have to resolve that by having the
 19 kind of hearing you are talking about because he or she will be
 20 confronted with that report and Ms. Kubitschek's pleadings that
 21 it is arbitrary and capricious. And the City will have to put
 22 in some kind of a defense and the Judge will make that
 23 decision.

24 If the third kind of Article 78 that I mentioned
 25 before, let's say they make an Article 78 about the letter that

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65N5HAYA argument

1 my client sent out denying them a hearing on this particular
 2 issue, that's a matter of -- and they'll say that's arbitrary
 3 and capricious and unlawful, the Judge wouldn't need a trial

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4 for that, he or she would just decide that as a matter of law.
 5 But, I think if the Article 78 is about the April 4th
 6 report the judge has the power under, I think it is CPLR
 7 7804(I) or maybe (J) -- I might have my letter wrong -- but he
 8 or she can have a hearing, if he needs one.

9 MS. KUBITSCHKE: Your Honor, may I be heard?

10 That is absolutely not true. Ms. Haynes cannot have a
 11 trial with examination and cross-examination of witnesses and
 12 documentary evidence in an Article 78 proceeding.

13 An Article 78 proceeding is a review of a
 14 determination by a state or local official. It is not a trial
 15 de novo. It is not even a trial at all.

16 And the sole issue is whether or not -- the review is
 17 extremely limited. The issue is whether or not the action of
 18 the governmental agent was arbitrary, capricious, contrary to
 19 law or not supported by substantial evidence. And if you say
 20 it was not supported by substantial evidence, the matter goes
 21 immediately to the appellate division. It is a paper review
 22 only.

23 Your Honor, we will be happy to brief this issue. It
 24 is simply not true that we could get a trial on the facts in
 25 any state court. Ms. Haynes has been completely foreclosed in

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65N5HAYA argument

1 the state venue from actually having a trial of the type that
 2 the magistrate judge would hold.

3 THE COURT: Let me just say this. This is an
 4 extremely difficult juncture because I believe there has not
 5 been reasonable process here. But for the federal court to
 6 undertake the hearing, what -- I'm sorry to just be reopening
 7 this, but I am back to the dilemma that I discussed at the time
 8 of the original decision.

9 MS. KUBITSCHKE: I understand that, your Honor.

10 THE COURT: It is really --

11 MS. KUBITSCHKE: May I say something?

12 THE COURT: I am providing a process but I'm not the
 13 right decision-maker. That's my problem. The issue will be an
 14 issue which is really different from the original violation of
 15 due process and, inevitably, has to weigh the merits of the
 16 foster care by Ms. Haynes and the foster care by the new
 17 people.

18 And when you say one slightly different standard
 19 versus another, it involves weighing the relative merits of
 20 those two foster care facilities and I believe that due process
 21 requires that that be done in a proper way -- hearing
 22 Ms. Haynes and her witnesses and hearing the City and their
 23 witnesses. I believe that that should be done.

24 But, if the federal court does it -- I can do it --
 25 then what is the kind of decision I'm supposed to come up with?

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65N5HAYA argument

1 Do I then decide, as a federal court, whether the foster care
 2 in one place is better than the foster care in the other place?

3 It is completely anomalous for me to decide that.

4 MS. KUBITSCHKE: Your Honor, it has been done before.
 5 Let me reassure the Court.

6 In the case of McLaughlin v. Hearnslly in the Third
 7 Circuit, the Third Circuit was faced with a similar situation.
 8 A little boy named Raymond went into foster care as a newborn

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9 and was placed in the home of Mr. and Mrs. McLaughlin.
 10 When Raymond was two years old -- the McLaughlins were
 11 not family, they were strangers to Raymond but he grew to love
 12 them as parents.

13 When Raymond was two years old a social worker in the
 14 Pennsylvania child welfare system thought that Raymond should
 15 be moved because Raymond was black and the McLaughlin's were
 16 white and he should live with black foster parents.

17 THE COURT: Who decided that?

18 MS. KUBITSCHKE: A social worker within the foster
 19 care system in Pennsylvania. The Pennsylvania foster care
 20 organization, whatever it was called -- Department of Human
 21 Services. And they moved Raymond. And the McLaughlins said,
 22 wait a minute. We have some due process here. And we also
 23 have an equal protection problem because you cannot take
 24 Raymond, you cannot make decisions, the government cannot make
 25 decisions based solely upon race.

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65N5HAYA argument

1 And they tried to get into the Pennsylvania state
 2 court system to seek their remedies and they were thwarted and
 3 they could not get a hearing in the Pennsylvania system. And
 4 so, they filed in the federal court in Pennsylvania in the
 5 Eastern District of Pennsylvania, and the federal judge says I
 6 think you are entitled to some kind of trial. And they
 7 actually held a trial.

8 THE COURT: On what issues?

9 MS. KUBITSCHKE: On the issues of whether Raymond
 10 should be returned to the McLaughlins or should stay in the new
 11 foster home with the family named Williams P. And the federal
 12 Court determined, based upon the evidence presented, that
 13 Raymond should be moved back to the McLaughlins.

14 THE COURT: On what standard? Why?

15 MS. KUBITSCHKE: Because it was a violation of the
 16 Constitution of equal protection because Raymond had -- and
 17 also because it was in Raymond's best interest to be with the
 18 family whom he had lived with for the first two years of his
 19 life and whom he had bonded with.

20 And the Court heard testimony on both sides.

21 MR. CHARNEY: Your Honor, let me just add something.
 22 We will give you the cite.

23 The District Court in this case held the exact kind of
 24 trial that you are suggesting now. They heard testimony from
 25 the plaintiffs, from the child welfare authority for

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65N5HAYA argument

1 Pennsylvania, as well as from the new foster parents on the
 2 issue of where would it be most appropriate for this child to
 3 live because time had passed since the original removal -- just
 4 as we have here. And it was a question now of where should the
 5 child live. And it heard evidence, it heard testimony and made
 6 a factual determination that it would be better for the child
 7 to be returned to that foster home, the original foster home.

8 So, it is virtually identical in terms of what the
 9 Court was doing and what it decided it needed to do is exactly
 10 what your Honor is suggesting now.

11 THE COURT: Let me just go to -- does anybody on the
 12 defense side have a suggestion? Please assume that I have
 13 ruled that there has not been due process in the sense of an

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14 appropriate factual hearing; does anybody have any better
 15 suggestion as to how to have that factual hearing than to have
 16 the federal court do it?

17 MS. NEUSTAETTER: Well, your Honor, first of all, I
 18 would like to say that in the family court proceeding the other
 19 day, the plaintiff did not make a motion to intervene. They
 20 simply showed up. The judge invited them to brief the question
 21 of their standing in that proceeding. The fact is that that
 22 proceeding was a termination of parental rights proceeding, the
 23 fact finding stage. The proceedings in family court of this
 24 sort have two phases, the first is fact-finding, the second is
 25 disposition.

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65N5HAYA argument

1 In the fact-finding stage the only issue is whether
 2 the mother Charia --

3 THE COURT: Look, we're not --

4 MS. NEUSTAETTER: No. But what I want to say is they
 5 have an absolute right to seek to intervene in the
 6 dispositional phase. That's the first thing.

7 THE COURT: Well, the second part of that hearing was
 8 about foster care, was it not?

9 MS. NEUSTAETTER: That is correct. And the judge
 10 invited them to brief the issue of standing. The Children's
 11 Law Center, for one, did not oppose their being there and there
 12 was no hearing on permanency on that date as.

13 As to the termination of parental rights proceeding --

14 THE COURT: The parental rights is irrelevant for us.
 15 I want to know about what happened on the foster care issue.

16 MS. NEUSTAETTER: What happened on the foster care
 17 issue that day was basically nothing. It was put over.

18 It was on for --

19 THE COURT: Put over until when?

20 MS. NEUSTAETTER: Until July.

21 THE COURT: Are you telling me that Ms. Haynes was
 22 invited to --

23 MS. NEUSTAETTER: To brief the issue of standing.

24 THE COURT: The issue of standing?

25 MS. KUBITSCHKE: Your Honor, that is simply not true.

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65N5HAYA argument

1 And I'm sorry, Ms. Neustaetter was not in court,
 2 Ms. Neustaetter's colleague was in court and objected to
 3 Ms. Haynes participating in any way. The Judge ruled that
 4 Ms. Haynes did not have standing and then said, would you like
 5 to brief the issue? after she had already made her ruling.

6 Now, your Honor, we had thought that Ms. Haynes did
 7 not have standing. We had thought that state law was fairly
 8 clear that Ms. Haynes does not have standing, that the New York
 9 Court of Appeals says the only remedy that an aggrieved foster
 10 parent has, even somebody who is the great aunt, the only
 11 remedy is this administrative proceeding.

12 But, based upon the representations that were made in
 13 this court on April 11th, we said let's try, since both the
 14 City and the Children's Law Center said they would not oppose
 15 Ms. Haynes' participation. But, when we got to court they
 16 opposed Ms. Haynes' participation. And Mr. Lansner submitted a
 17 sworn declaration saying that is precisely what happened. He
 18 was there. He will testify, if necessary, in this court, that

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19 he was told we have no standing to participate in any trial in
20 the family court.

21 Ms. Haynes has no remedy in the family court.

22 THE COURT: Mr. Kraft said that she doesn't have any
23 standing, so.

24 MS. KUBITSCHKE: So, Mr. Kraft and I and the family
25 court judge all agree that Ms. Haynes cannot be heard in the

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65N5HAYA argument
1 family court.

2 THE COURT: Look, we have to go to something else.

3 Mr. Levine, do you have any ideas?

4 MR. LEVINE: Your Honor, I believe that she does have
5 the right to petition to participate in the permanency hearing.

6 THE COURT: In the family court.

7 MR. LEVINE: In the family court and bring a custody
8 proceeding in the family court.

9 Now, there is a case that makes that difficult, but
10 the fact of the matter is New York Law is not settled on that,
11 and it is an additional reason for abstention under the Pullman
12 Doctrine where you have an unclear situation of law that has
13 not been resolved by the highest court.

14 THE COURT: Okay now, look.

15 MR. LEVINE: And then your Honor, finally, in terms of
16 hearing, they have the right to petition for adoption after the
17 termination of parental rights.

18 THE COURT: It seems to me that the only sure way to
19 get a hearing is to have it in the federal court. If I adjourn
20 this and order for Ms. Haynes to seek something in the family
21 court it is uncertain what, if anything, she will get.

22 And time goes on and already too much time has passed
23 and so I'm granting the motion for reargument. I am directing
24 that a hearing be held in the federal court as to the proper
25 remedy for the violation of due process in the removal of the

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65N5HAYA argument

1 child. The issues about the proper remedy will include issues
2 about the relative benefit or detriment involved in having the
3 child returned to Ms. Haynes versus keeping her in the care of
4 the current foster parents.

5 I will sign an order by the end of the week embodying
6 what I have just said and that should be circulated among
7 counsel and I want to sign that. And it will be, that matter
8 will be referred to the magistrate judge who is on this case
9 and I don't know who that is at the moment.

10 MS. KUBITSCHKE: Your Honor, it is Magistrate Judge
11 Katz.

12 THE COURT: All right. And that's the ruling.

13 MR. LEVINE: Your Honor, I don't want to be
14 contentious but I would like to make one statement to reserve
15 the record, if that's okay.

16 THE COURT: Okay.

17 MR. LEVINE: And that is simply, your Honor, that with
18 respect to this kind of hearing, notwithstanding the case in
19 the Third Circuit that was decided on equal protection grounds,
20 we cited, on April 11th, a string of cases saying that the
21 federal court does not have subject matter jurisdiction in this
22 kind of hearing. I just want to reiterate that much.

23 THE COURT: All right, I believe I do. It is the only
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24 way I can see to get anything done. If we sent it back to the
25 State and City side the risk is in a few weeks we will be back
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65N5HAYA argument
1 here, everybody frustrated, nothing accomplished. And we can't
2 have that anymore.
3 Thank you.

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6C4FRIVC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 MABLE RIVERA AND ANTHONY
4 RIVERA,

5 Plaintiffs,

6 v.

06 CV 7077 (TPG)

7 CITY OF NEW YORK, et al.,

8 Defendants.

9
10 New York, N.Y.
December 4, 2006
4:50 p.m.

11 Before:

12 HON. THOMAS P. GRIESA,

13 District Judge

14 APPEARANCES

15 LASSNER & KUBITSCHKE

16 Attorneys for Plaintiffs Mable and Anthony Rivera

DARIUS CHARNEY

17 CAROLYN A. KUBITSCHKE

18 LESLIE A. ABBEY

The Legal Aid Society

19 Attorney for Plaintiff Jada Chapman

20 SUSAN BARIE

21 Brooklyn Legal Services Corp.

22 Attorney for Plaintiff Mother

23 JESSIE I. LEVINE

Attorney for Defendant City of New York

24 ROBERT KRAFT

25 Attorney for Defendant State of New York

6C4FRIVC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----X

3 MABLE RIVERA AND ANTHONY
4 RIVERA,

Plaintiffs,

v.

06 CV 7077 (TPG)

6 CITY OF NEW YORK, et al.,

7 Defendants.

8 -----X

9 New York, N.Y.
10 December 4, 2006
4:50 p.m.

11 Before:

12 HON. THOMAS P. GRIESA,

13 District Judge

14 APPEARANCES

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21 Brooklyn Legal Services Corp.

Attorney for Plaintiff Mother

22 JESSIE I. LEVINE

23 Attorney for Defendant City of New York

24 ROBERT KRAFT

25 Attorney for Defendant State of New York

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1 (Case called)

2 (In open court)

3 THE DEPUTY CLERK: Matter of Mable Rivera, Anthony
4 Rivera versus the Commissioner John Mattingly and the City of
5 New York. Counsel, state your appearances?

6 MR. CHARNEY: Darrell Charney, Lassner & Kutibschek,
7 325 Broadway, New York, New York 10007 for the plaintiffs,
8 Mable and Anthony Rivera, as well as the infant plaintiffs,
9 Erica Simmons and Bryanna Chapman.

10 MS. KUBITSCHKEK: Carolyn Kubitschek, Lassner &
11 Kubitschek, and, your Honor, standing to my left and your right
12 is Franco Munoz, who is an attorney with the AARP Foundation
13 litigation which represents the American Association of Retired
14 Persons, a 37-million member organization. Mr. Munoz is a
15 member of the Bars of the District of Columbia and Virginia,
16 and also the DC circuit of the District and the District of
17 Virginia and the Fourth Circuit, and I would like to move his
18 admission pro hac vice. I have an order --

19 THE COURT: I have no problem. He represents whom?

20 MS. KUBITSCHKEK: He will come in as co-counsel with us
21 representing the plaintiffs upon his admission.

22 MR. KRAFT: Your Honor, if I may respectfully object.
23 I believe there's an attorneys fee application in this
24 complaint, and I believe under those circumstances the
25 defendants --

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1 THE COURT: You believe what? I'm sorry?

2 MR. KRAFT: I believe since plaintiffs are seeking
3 attorneys fees from the defendants, should they prevail, the
4 defendants should bring certain matters to your attention. The
5 AARP is already appearing in the class action before your
6 Honor, Balbuena, et al, versus the City of New York. There's
7 no reason to have Mr. Munoz appear in this separate case, and
8 then bill for it.

9 The plaintiffs here are represented by able counsel,
10 and they don't need this, and this is just over-partnering, and
11 I don't think a private client, if Ms. Rivera and Mr. Rivera
12 had to pay Mr. Munoz, I don't think they would do it and I
13 think that's the standard you have to apply when considering
14 the appearance of extra attorneys in a case where counsel is
15 seeking payment from the government.

16 MS. KUBITSCHKEK: May I respond, your Honor?

17 THE COURT: All right.

18 MS. KUBITSCHKEK: This is an application for an
19 attorney who is licensed to practice in the state and federal
20 courts of two other jurisdictions.

21 THE COURT: I have no problem with his credentials.

22 MS. KUBITSCHKEK: It has nothing to do with fees.

23 THE COURT: I don't understand why we have to have so
24 many lawyers for the plaintiff.

25 MS. KUBITSCHKEK: Well, your Honor, AARP has been --

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1 THE COURT: What does AARP have to do with this
2 matter?

3 MS. KUBITSCHK: AARP has a great interest in
4 relatives over the age of 50 who are caring for children. It
5 has been an interest of theirs for a long time, and, frankly,
6 your Honor, we can share the work.

7 THE COURT: What about, you and Mr. Charney, can't you
8 handle it?

9 MS. KUBITSCHK: Your Honor, this is a situation where
10 the plaintiff is entitled to choose her own attorneys.

11 THE COURT: But not endless numbers of people, though.

12 MR. MUNOZ: Your Honor, if I may make a statement?

13 THE COURT: Your name is, again?

14 MR. MUNOZ: Franco Munoz. I'm the attorney subject to
15 the motion for pro hac vice. Your Honor, AARP has over 35
16 million members nationwide, 2.5 million members in New York
17 State alone. Your Honor, the Census Bureau has found that the
18 traditional family, where there are two birth parents raising
19 the children, no longer exists. The Census Bureau has found
20 that a majority of American families have either one birth
21 parent or no birth partners --

22 THE COURT: What does that have to do with the issue
23 of how many lawyers we need? What does it have to do with how
24 many lawyers the plaintiff needs?

25 MR. MUNOZ: Your Honor, first of all, it's my

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1 understanding, and I apologize if I'm in error, but there was
2 no certification of the class as of yet, so we would like to be
3 part of all the cases in the event that the class certification
4 is not entered, first.

5 Secondly, your Honor, counsel stated --

6 THE COURT: This is a motion for reconsideration. We
7 do not need any further lawyers. Thank you for coming, I
8 appreciate your being here, and I have no objection to your
9 credentials, but I will not add you to counsel on this case.
10 Thank you very much, and let's proceed. This is a motion for
11 reconsideration.

12 MS. KUBITSCHKEK: May I please submit the order so your
13 Honor can deny it so that we can seek appropriate review?

14 THE COURT: You're going to appeal from that?

15 MS. KUBITSCHKEK: Your Honor, we will -- the plaintiffs
16 must be --

17 THE COURT: The record is what it is. You applied and
18 it's denied on the record. Please. Let us move forward. We
19 have a motion to cover in substance. Can we do that? Would
20 you like to sit down and somebody speak for the motion in
21 substance?

22 MS. KUBITSCHKEK: Your Honor, Mr. Charney is going to
23 speak on the motion.

24 THE COURT: All right, Mr. Charney. Thank you.

25 MR. CHARNEY: Your Honor, before I do that, I want to

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1 note that one of the infant plaintiffs, Jada Chapman, has a new
2 attorney who is going to substitute in for her. It's The Legal
3 Aid Society Juvenile Rights Division, which represents Jada in
4 family court. They are also attorneys for the putative
5 subclass in the Balbuena case. Again, it's putative because
6 that class has not been certified. They clearly have an
7 interest in this case and I'll let Ms. Abbey note her
8 appearance.

9 THE COURT: You represent who?

10 MS. ABBEY: Your Honor, we represent Jada Chapman.
11 I'm Leslie Abbey I'm standing in for Jada Chapman.

12 THE COURT: Jada is one of the infants in the case?

13 MS. ABBEY: She's the youngest infant. She's the
14 oldest, I apologize.

15 MR. CHARNEY: The other two are Bryanna Chapman and
16 Erica Simmons, who are Jada's first cousins.

17 THE COURT: Let me get those names again. I know we
18 have them in the -- we have Erica?

19 MR. CHARNEY: Erica Simmons and Bryanna Chapman.

20 THE COURT: And Jada Chapman.

21 MR. CHARNEY: Jada Chapman.

22 MS. ABBEY: Your Honor, Legal Aid is asking only to be
23 substituted as Jada's counsel in this case. We represent Jada
24 in the family court.

25 THE COURT: All right. Let's now talk about the

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1 motion, please.

2 MR. CHARNEY: Your Honor, we last appeared before you
3 on September 14 of this year. That was the day that we filed
4 this federal civil rights lawsuit and applied for a motion for
5 preliminary injunctive relief. We were seeking at that time
6 the return of the three infant plaintiffs to the home of Mable
7 and Anthony Rivera, who are their great aunt and uncle, and had
8 been their caretakers for at that point over six and a half
9 years. The girls came to them all when they were under the age
10 of two. They lived with them for over six years and on
11 March 31 of this year, they were removed on an emergency basis
12 without prior notice or a prior hearing, based on an alleged
13 act of sexual abuse, not by the Riveras, but by their adult
14 daughter's boyfriend who was not a resident in their home.

15 That allegation was subsequently investigated by the
16 defendant City's Administration for Children's Services and was
17 proved to be false. A report was completed in July of this
18 year, and it stated that all of the allegations against both
19 the alleged perpetrator, this gentleman by the name of Leandro
20 Johnson, as well as allegations against Ms. Rivera for what's
21 called inadequate guardianship meaning she either, A, failed to
22 protect them from this or exposed them to inappropriate
23 materials, all of those allegations were proven false.

24 At that point in time, this is July, Ms. Rivera asked
25 the foster care agency which contracts with ACS, is an agent of

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1 ACS, they're a defendant here, they're known as Family Support
2 Systems Unlimited, she asked if the girls could be returned to
3 her and Mr. Rivera's home where they lived essentially their
4 whole lives. The agency did a safety assessment. They came to
5 the Riveras' home on August 23rd, along with case workers,
6 looked around the house, asked a lot of questions, did an
7 assessment, which I guess as an agency they do in their normal
8 course of supervising children in foster homes. They made a
9 determination that the home was safe to return the children to.

10 Your Honor has before him, I believe, as Plaintiff's
11 Exhibit 2, which was submitted in our original motion for
12 preliminary injunction, a letter from the attorney for Family
13 Support Systems stating that the girls would be returned on
14 August 26, 2006.

15 On that day, Mr. and Mrs. Rivera drove to the offices
16 of Family Support Systems to pick up the three girls. The
17 girls were there with their suitcases. Upon arrival, she was
18 informed by Family Support Systems that ACS had decided that
19 the girls could not be removed. When she was asked for an
20 explanation, she was not given one.

21 Since that time, she has not seen Erica and Bryanna at
22 all. She has seen Jada on one occasion, she was granted a
23 visit on October 17, but has not seen Jada since that time. In
24 addition, she has been told she is not permitted to speak to
25 them on the telephone.

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1 Our lawsuit, which we filed on September 14, we allege
2 three constitutional violations in this case. One was a
3 substantive due process violation based on the removal itself.
4 We allege that the removal was made without probable cause and
5 in violation of the fundamental liberty interests of the
6 Riveras and the girls to live together. We also made an
7 allegation that the continued detention of the girls even after
8 it was proven that the allegation was false also violated the
9 Riveras' and the girls' subsequent due process right to live
10 together as a family, and, finally, we made an allegation that
11 the process that the Riveras have had to go through since
12 removal in order to try to be heard and obtain relief was a
13 violation of their procedural due process rights. In other
14 words, it was completely inadequate.

15 To date, the Riveras have not received any sort of
16 hearing in the New York State Family Court. Your Honor has
17 before him, I believe as Exhibit 9, a decision issued by the
18 Queens Family Court stating that the Riveras do not have a
19 right to be heard on this issue in the family courts in the
20 State of New York.

21 Following the removal in April, about three weeks
22 after the removal, there was a meeting convened at ACS, which
23 is called an independent review. It is not a hearing. There
24 is no sworn testimony, there's no ability to cross-examine
25 witnesses and the decision maker is an employee of ACS itself.

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1 That independent review, not surprisingly, determined that the
2 removal was correct.

3 Now, it's also important to note that that decision
4 was made prior to the completion of the investigation into the
5 allegations. So, in other words, it was a decision that was
6 made before there was a complete record of the allegations
7 against the Riveras. That report was completed in July and at
8 that point the agency itself, the foster care agency made a
9 decision to return the children. The foster care agency is the
10 agency that actually goes to the home, visits the children,
11 visits the foster parents and has direct contact with these
12 families. ACS overruled this decision, yet no one from ACS has
13 been to the Riveras' home, no one from ACS that we know of has
14 actually spoken directly to the children, other than the people
15 who investigated the allegations. And remember, that
16 investigation concluded that there had not been any form of
17 abuse or maltreatment to those children.

18 After losing the independent review, the Riveras
19 requested what's called a fair hearing from the defendant, the
20 New York State Office of Children and Family Services. Under
21 New York State law, that is their only remedy to a removal, as
22 the Family Court noted in its decision and is stated under
23 Social Services Law 400.

24 THE COURT: What's the only remedy?

25 MR. CHARNEY: The only remedy is an administrative

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1 remedy, it's known as a fair hearing that they have before
2 what's called the New York State Office of Children and Family
3 Services, which is a State agency that oversees all the local
4 child welfare agencies, including ACS.

5 This fair hearing is constitutionally inadequate in
6 many respects. By regulation, the hearing officer is able to
7 admit all hearsay evidence, which means the Riveras do not have
8 the ability to confront witnesses who provide evidence against
9 them. In this situation ACS did not appear at this fair
10 hearing. The foster care agency Family Support did appear and
11 proceeded to submit as their only exhibit the investigation
12 report done by ACS, yet no one who actually performed that
13 investigation appeared at that hearing, and therefore the
14 Riveras did not have any opportunity to cross-examine any
15 witnesses from ACS who made these statements in this report
16 much less any persons whose statements are quoted in that
17 report.

18 In addition, the standard of proof, again, by state
19 regulation for these hearings is only substantial evidence.
20 In other words, all that the agency or ACS has to do is prove
21 that there was some rational basis, some -- I don't even --
22 it's not even a rational basis -- some less than the majority
23 of the evidence that supports the removal decision, and in a
24 situation as this, where you're really talking about a
25 deprivation of a very important liberty interest, to have a

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1 standard of proof of less than preponderance of the evidence
2 cannot be constitutional.

3 Finally, or not finally, the third problem is that the
4 decision maker, again, is an employee of the state agency that
5 oversees ACS. It's not an independent judiciary, an
6 independent branch that oversees this issue. Finally, the
7 timing of these, this is something I'd like to draw your
8 Honor's attention to. We addressed this issue, as I'm sure
9 you'll remember, in a prior case, Haynes v. Mattingly, several
10 months ago. It was an identical situation. The plaintiff, who
11 was a great aunt, pursued that administrative hearing.

12 The problem with the administrative hearing was
13 twofold. One is that the hearing took many, many months to
14 commence and be completed, and then another two months to even
15 get a decision, so that by the time there was a decision, it
16 had been eight months since the child had been removed from the
17 aunt's home.

18 In this case, you have a very similar situation. The
19 hearing was originally supposed to go forward on August 24. As
20 your Honor noted in the hearing that we had on September 14,
21 for some reason, this hearing was adjourned over a month. It
22 was adjourned from August 24th to then August 30th, and then
23 from August 30th to October 2nd, and your Honor both in this
24 case and in the Haynes case, very astutely pointed out that
25 this constant delay and this passage of time in and of itself,

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1 really harms the families and the children involved here,
2 because every day that passes and the longer that these
3 families are separated from each other, the more difficult it
4 is then for the children and the parents to really re-establish
5 that bond if and when it comes a time for them to be reunited.

6 I can cite to your Honor the transcript from the
7 Haynes case which we also submitted as an Exhibit, I believe
8 Exhibit 6. I believe on pages 30 and 31 of that transcript,
9 your Honor correctly noted that this delay in timing in terms
10 of holding these fair hearings is very problematic, and in this
11 case, I believe the transcript from the September 14th hearing,
12 your Honor, on page 27 also makes reference to the passage of
13 time as very significant and very problematic in these
14 situations.

15 So that's -- the timing of these fair hearings is
16 really a problem and a violation of due process.

17 And, finally, and perhaps most importantly, the State
18 of New York went on record in the Haynes case before your Honor
19 on May 23rd. Mr. Kraft was here, and stated to your Honor that
20 even if a situation where the kinship foster parent is
21 victorious on the merits in these fair hearings, in other
22 words, the State makes a determination that the removal was
23 wrong, the State will not order ACS to return the children.
24 They could not believe that they have the authority to tell ACS
25 to place the child back in the home from which they were

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1 wrongfully removed. So, in effect, you have a substantively
2 meaningless remedy, and your Honor again in the Haynes case in
3 that hearing on May 23rd, correctly pointed out that that is
4 not due process when you have a remedy that is meaningless.

5 So the only remedies provided under State law for the
6 Riveras in this case are clearly constitutionally inadequate.
7 So you have a procedural due process problem and you also have
8 the substantive due process problem with the continued
9 detention.

10 The reason this is a motion for reconsideration, your
11 Honor, at the hearing of September 14, your Honor addressed the
12 original removal decision on March 31. Your Honor did not
13 address the continued detention in view of the unfounding of
14 the allegations. In addition, your Honor made a finding that
15 the investigation that OCI did constituted due process.
16 However, that investigation was not a hearing.

17 Secondly, since September 14, many, many things have
18 happened in this case.

19 THE COURT: Look, can I interrupt you?

20 MR. CHARNEY: Yes.

21 THE COURT: I don't want to get technical and I don't
22 want to make labels and all of paramount importance. This
23 isn't a motion to reconsider. This is a brand new motion for
24 injunctive relief. And I don't think it's a small matter.
25 It's labeled as a motion to reconsider. It's not. It's a

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1 motion for injunctive relief based on events that had not even
2 occurred as of September 14, so that's what we have, and that's
3 what you're addressing. But I'm not sure that the defense side
4 has really perhaps had the opportunity that it should have.
5 Maybe it has had, but --

6 MR. CHARNEY: Your Honor, the defendants have
7 submitted papers -- well, the City has submitted papers in
8 opposition to this motion, in fact, two sets of papers. In
9 addition, I agreed to an adjournment because Mr. Levine had
10 some family issues he needed to deal with, gave him an
11 extension of time in fact to submit those opposition papers.
12 So I would submit the defendants have had the opportunity.

13 THE COURT: I suppose they have.

14 MR. LEVINE: Your Honor, may I address that?

15 THE COURT: Yes.

16 MR. LEVINE: Plaintiff has submitted four sets of
17 papers --

18 THE COURT: You're Mr. Levine?

19 MR. LEVINE: Yes. Plaintiff has submitted four sets
20 of papers since October 30th, the adjourned date, including
21 papers submitted by other counsel. We have not had an
22 opportunity to address, what, as the Court properly points out,
23 is essentially a brand new motion.

24 MR. CHARNEY: Your Honor, the problem with --

25 THE COURT: Wait a minute. Mr. Levine, you submitted

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1 papers, haven't you?

2 MR. LEVINE: We submitted papers on the motion, and
3 our papers at that point said this is not properly a motion for
4 reconsideration, and it was not properly brought under Rule 54,
5 which was the alternative relief. Since that time, there were
6 three sets of papers produced, including as late as Thursday
7 this afternoon describing what allegedly went on in the family
8 court. I'm not even going to get into the question where it's
9 counsel, witness, advocate dichotomy, I'm just saying this was
10 submitted Thursday afternoon and we have not had an opportunity
11 to address these issues.

12 If your Honor wants to treat it as a brand new motion,
13 we'll be happy to deal with it in that way.

14 THE COURT: Well, now, look. Look. What I have from
15 you is a memorandum dated October 24 in opposition to the
16 motion for reconsideration.

17 MR. LEVINE: That's correct.

18 THE COURT: And there was a declaration of yours, and
19 it really --

20 MR. CHARNEY: Your Honor, there's also a supplemental
21 declaration he did, I believe in November, and I would just add
22 that the papers that we have submitted --

23 THE COURT: Look. Look. Just take it easy, please.
24 Take it easy. Do I have everything on this motion?

25 MS. ABBEY: Your Honor, Legal Aid also submitted a

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1 declaration in support of the motion.

2 THE COURT: Right now I'm concerned about, for some
3 reason I don't have on the bench a second -- was there a second
4 declaration, Mr. Levine?

5 MR. LEVINE: Yes, there were, just pointing out there
6 were ongoing proceedings, your Honor.

7 THE COURT: There were what?

8 MR. LEVINE: Just pointing out there were ongoing
9 proceedings in the family and state court.

10 THE COURT: Can I see that? Was there another
11 memorandum of law?

12 MR. LEVINE: No, sir.

13 THE COURT: Can I see the declaration?

14 MR. LEVINE: Your Honor --

15 MR. CHARNEY: I have a copy.

16 THE COURT: All right, let me see that.

17 MR. CHARNEY: Your Honor, if I just may point out one
18 thing?

19 THE COURT: Wait a minute. Wait a minute.

20 (Pause)

21 THE COURT: Well, the November 14 declaration, is a
22 rather brief span; November 16 simply talks about proceedings
23 that have happened. At least it's up to date, I assume,
24 through the middle of November, and talks about certain
25 proceedings that have been set for November 20.

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1 MR. CHARNEY: And, your Honor, my supplemental reply
2 declaration, which Mr. Levine is referring to from last week,
3 simply picks up where he left off. It describes what happened
4 on November 20, as well as what happened on November 29.

5 Since we submitted our reply memo of law on
6 October 30, which was the return date, we have not submitted
7 any additional legal arguments, and all of the declarations
8 that have been submitted have been to update the Court on what
9 has gone on in the intervening time. Because as Mr. Levine
10 correctly points out, there is an ongoing case in the Family
11 Court. However, the Riveras really have no opportunity to
12 participate in that. That's what we were trying to make clear
13 to the Court.

14 MR. LEVINE: Your Honor, may I suggest that if the
15 Court, and I think appropriately wishes to treat this as a new
16 motion, that the City be given a reasonable amount of time to
17 respond with memorandum and affidavits, and we'll be glad to
18 hear it again.

19 MR. CHARNEY: I would object to the memo of law,
20 because they did an opposition and we did an opening brief and
21 a reply brief and that's all that everybody is entitled to.

22 THE COURT: Well, maybe that's what people are
23 entitled to, but you really have labeled your motion as
24 something that it is not. This isn't a motion for
25 reconsideration. This is a motion for relief based on facts,

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1 on circumstances that exist now and have surely developed since
2 the time of your original motion.

3 Now, look, I am faced with two things. Number one,
4 I've got what I regard as a fairly complex motion now, and it
5 has to be presented thoroughly, and I'm not confident that it
6 has been.

7 At the same time, I'm conscious that time is
8 important, and taking a lot of time for briefing and so forth
9 could work prejudice to the plaintiff's claim simply because of
10 the passage of time.

11 I'm going to ask, what's the situation about Jada now?

12 MR. CHARNEY: Jada, her mother -- her mother's
13 attorney is actually sitting at the end of the table here,
14 that's Susan Barie. She's the attorney for Jada's birth mother
15 in the family court. Jada's mother, Latoya Chapman, signed
16 what's called a conditional surrender last year. She
17 surrendered her parental rights in Jada only on the condition
18 that the Riveras adopt her. The Riveras began filling out the
19 paperwork for Jada's adoption last year. Jada has now been
20 removed, the process has stopped with respect to Jada and
21 according to the foster care agency case worker who testified
22 before the family court on October 23rd, they're actively
23 looking for a new adoptive home for Jada.

24 Jada's mother wants her to be adopted by the Riveras.
25 I'm not going to speak for them, but in my discussions with

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1 them they have stated they're in support of the Riveras
2 adopting Jada and, of course, the Riveras are interested in
3 adopting Jada.

4 THE COURT: The Legal Aid Society represents Jada,
5 right?

6 MS. ABBEY: Yes, your Honor. We do represent Jada.
7 We very much want Jada to return to the Riveras. She very much
8 wants to return there immediately. She has lived there nearly
9 all her life and they've been separated for --

10 THE COURT: She's how old?

11 MS. ABBEY: She's nine. She's been there since 1998,
12 and she was removed earlier this year and she very much wants
13 to return. We'd like that to happen immediately.

14 THE COURT: And her natural mother --

15 MS. BARIE: I represent her natural mother and that's
16 exactly what the natural mother wants as well.

17 THE COURT: What's preventing that from happening?

18 MR. CHARNEY: That's part of the reason we brought
19 this lawsuit, your Honor, because ACS has not provided us
20 literally any reason. It would be one thing if they provided
21 us --

22 THE COURT: Let me just interrupt. The evidence
23 before me in September was not so simple. It was not so
24 simple. It wasn't that the Riveras were engaging in any child
25 molestation or anything like that, but this young man by the

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1 name of Johnson was coming up to see the Riveras' daughter, I
2 think her name was --

3 MR. CHARNEY: Rhonda, your Honor, yes. The Riveras'
4 adult daughter.

5 THE COURT: And the evidence was quite clear that he
6 was acting -- that the little infants would go over to that
7 part of the house where he would come.

8 MR. CHARNEY: Your Honor, I don't know if that's
9 accurate.

10 THE COURT: Well, let me finish. And that Jada and
11 the two other infants, foster kids, would go over to this part
12 of the house, and Johnson would be there and what I found was
13 that there was evidence that he was not literally physically
14 molesting the little girls, but that he was talking in a way,
15 in an enticing way, in a sexy way, and that that was a problem.

16 MR. CHARNEY: Well, your Honor, two things. The
17 report that you're referring to, which is in evidence in this
18 case, actually does not say that. It concludes, it has several
19 conclusions after a three-month investigation, that not only
20 did Mr. Johnson not sexually abuse the children, but he also
21 didn't what's called provide inadequate guardianship, which is
22 kind of a catch-all phrase about the things you're talking
23 about; exposing children to inappropriate materials, saying
24 inappropriate things to them, touching them in inappropriate
25 ways, all of that was found to be unsubstantiated. In

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1 addition, the report you're referring to --

2 THE COURT: When was it found unsubstantiated?

3 MR. CHARNEY: It was found unsubstantiated in July of
4 this year, prior to this lawsuit. That's why we brought this
5 lawsuit, your Honor.

6 THE COURT: I apparently felt there was enough
7 evidence of that to cause me to deny the relief sought by the
8 plaintiffs then.

9 MR. CHARNEY: Respectfully, your Honor, all you
10 addressed was the initial removal decision. We're not
11 contesting that at this point. We're questioning the continued
12 detention of the children even after a thorough investigation
13 determined that there was no abuse or neglect in the Rivera
14 home. In addition, Mrs. Rivera has not permitted Mr. Johnson
15 to enter her home since April. It's now been seven months.
16 The agency went to the home in August. He wasn't there. They
17 looked around the house. They were aware of the situation,
18 they're the ones that removed the children initially and they
19 made a determination, I'm talking about Family Support Systems.
20 ACS overruled them and they have not provided us with a reason
21 why. To have absolutely no reason, an absence of a reason for
22 doing something is clearly -- that's arbitrary and capricious
23 and unconstitutional.

24 THE COURT: Basically, all I said at the time was, and
25 I looked at the transcript, there were factual issues, and the

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1 authorities were engaged in due process about those issues.
2 Now, if the issues have been resolved, and if the issues have
3 definitely been resolved and if the young man Johnson is not
4 allowed back in the home, then if in the course of this process
5 that has been worked out --

6 MR. CHARNEY: But that's the problem, your Honor.

7 THE COURT: Please, let me finish.

8 MR. CHARNEY: I'm sorry.

9 THE COURT: If that has been worked out, then it seems
10 to me due process has got to lead to some result. It can't
11 just be processed forever, and if in the due process it is
12 established that the one source of danger that I felt, and that
13 was Johnson being around there, not the Riveras, I repeatedly
14 said the Riveras were totally innocent of any wrongdoing, but
15 my only concern was this fellow. And if that has been resolved
16 in the course of the process, then there should be a result of
17 that process consistent with that resolution.

18 MR. CHARNEY: We agree, your Honor.

19 THE COURT: So, Mr. Levine, what has been the result?
20 There's been a lot of time for investigation or hearing and
21 everything you could possibly think of. What has been the
22 result of this process, because that is what I found in my
23 bench ruling, that that could go on, but there's got to come an
24 end to that process. What's been the result of that process?

25 MR. LEVINE: Your Honor, we do not believe that the

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1 OCI investigation, which found the facts that you found, merely
2 made the conclusion that the mistreatment allegation was
3 unfounded, is not conclusive. The agency --

4 THE COURT: Well, what has happened to that? Who has
5 investigated what, and what is --

6 MR. LEVINE: Your Honor, the agency still believes
7 that the Riveras did not give --

8 THE COURT: Who has investigated to determine, first
9 of all, whether the original, whether this sexy conduct ever
10 went on, and secondly, has the source of the sexy conduct been
11 excluded?

12 MR. LEVINE: We don't know the answer to that, your
13 Honor.

14 THE COURT: How can you not know the answer on
15 December 4th?

16 MR. LEVINE: Because, your Honor, once the children
17 were removed, there was no supervision of the household.

18 MR. CHARNEY: Your Honor, first of all, that's not --

19 THE COURT: Please. Mr. Charney, why don't you sit
20 down. What do you mean, no supervision of the household? Why
21 would there be?

22 MR. LEVINE: There would not be, your Honor, because
23 they're no longer foster children.

24 THE COURT: That's just no answer. It's just no
25 answer at all.

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1 MR. LEVINE: Your Honor, I understand it has a certain
2 circular logic. However, in the sense that there is nothing to
3 assess at this point, but the assessment that the agency made
4 was that there was a danger, your Honor saw the --

5 THE COURT: But that assessment was made when?

6 MR. LEVINE: That was made in March and April, your
7 Honor.

8 THE COURT: That's a long time ago.

9 MR. LEVINE: I know, but one of the problems was, and
10 the report references that, is that Mrs. Rivera was defending
11 Johnson, calling the girls liars and defending Johnson and that
12 was the true source and the continuing source of the agency's
13 concern about her providing appropriate guardianship and
14 protection.

15 THE COURT: Is there some finding that she was
16 falsifying in what she said about Johnson?

17 MR. LEVINE: They didn't make a finding. They pointed
18 out in their interviews --

19 THE COURT: Pointed out in what, in some document?

20 MR. LEVINE: In the OCI report that your Honor
21 referred to.

22 THE COURT: In September?

23 MR. CHARNEY: No.

24 MR. LEVINE: In March. At the time of the removal,
25 your Honor.

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1 THE COURT: Look, that's ancient history by now.

2 MR. LEVINE: No, there has not been an independent
3 evaluation of the appropriateness of the home since that time,
4 your Honor.

5 THE COURT: I have to tell you, one reason I denied
6 the plaintiff's relief, I thought a process was going on. But
7 what you're telling me is no process is even going on.

8 MR. LEVINE: No, your Honor, that's the OCI process.
9 The fair hearing process --

10 THE COURT: What's the OCI, what does it mean?

11 MR. LEVINE: That was the office of confidential
12 investigations.

13 THE COURT: That's a City agency?

14 MR. LEVINE: That's part of ACS, your Honor.

15 THE COURT: ACS is what? What does that mean?

16 MR. LEVINE: Administration for Children's Services.

17 THE COURT: Administration for Children's Services?

18 MR. LEVINE: Yes, your Honor.

19 THE COURT: And the OCI is part of that?

20 MR. LEVINE: Yes.

21 THE COURT: But the ACS is in charge of things, aren't
22 they?

23 MR. LEVINE: That's correct, your Honor.

24 THE COURT: And have they had any kind of inquiry,
25 made any kind of inquiry, investigation or whatever you want to

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1 call it, to determine what's the situation about this Johnson
2 fellow? That was the problem.

3 MR. LEVINE: I understand, your Honor, but not since
4 that time. The independent review was held --

5 THE COURT: I'm asking you about the ACS. The ACS
6 is --

7 MR. LEVINE: It has not made a further formal
8 investigation.

9 THE COURT: Then there's no process by ACS, then?

10 MR. LEVINE: Your Honor, the process was to evaluate
11 what happened. They made the removal. The parents had the
12 right to challenge, which they did. They went to the
13 independent review, and then they went to the fair hearing.

14 THE COURT: Independent review is what? Conducted by
15 the state?

16 MR. CHARNEY: No.

17 MR. LEVINE: That's conducted by the City.

18 THE COURT: Part of the ACS?

19 MR. LEVINE: Yes. They then went to the State.

20 THE COURT: What happened at the independent review?

21 MR. LEVINE: The removal was upheld at the independent
22 review.

23 MR. CHARNEY: Your Honor, I just have to interrupt for
24 one second.

25 THE COURT: Wait a minute, sit down. Had the

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1 independent review finished by the time of my September
2 hearing?

3 MR. LEVINE: Yes, your Honor.

4 THE COURT: What?

5 MR. LEVINE: Yes.

6 THE COURT: And the independent review, what, did they
7 issue some findings or what?

8 MR. LEVINE: They just held it as informal. The
9 plaintiffs appealed for the fair hearing.

10 THE COURT: The independent review, did they issue
11 some decision or finding or ruling?

12 MR. LEVINE: Yes.

13 THE COURT: And what was that?

14 MR. LEVINE: That the removal was justified.

15 THE COURT: And all right, the removal was justified
16 and the removal took place back in what, March?

17 MR. LEVINE: March.

18 THE COURT: Okay, and they didn't consider they had to
19 worry about what was the current situation?

20 MR. LEVINE: No, your Honor. That was challenged then
21 to the fair hearing, and I believe that there were four days of
22 hearings at the fair hearing which concluded --

23 THE COURT: Who conducts the fair hearing; the State?

24 MR. LEVINE: The State. They concluded on November 7,
25 and they're awaiting decision on that.

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1 THE COURT: Decision is still being awaited?

2 MR. LEVINE: Since November 7, your Honor.

3 THE COURT: When is that decision going -- Mr. --

4 MR. KRAFT: Kraft, Judge.

5 THE COURT: When is the decision coming out?

6 MR. KRAFT: I spoke with the head of fair hearings.

7 He pointed out to me it was four days of hearing, it was a long
8 transcript. The transcript has now been provided to the
9 administrative law judge for her review, and she's expected to
10 get her draft decision done either this week or next week, send
11 it up to the commissioner's designee and the commissioner's
12 designee will either approve it or tell her that based on the
13 facts she ought to write a new one, but that's how the process
14 works. The administrative law judge drafts a decision based on
15 the transcript and the commissioner's designee reviews it. I
16 expect a decision by the end of this month, hopefully sooner.

17 THE COURT: What were the issues before the
18 independent -- what do you call it, independent hearing?

19 MR. KRAFT: The fair hearing, Judge?

20 THE COURT: The fair hearing.

21 MR. KRAFT: I don't know exactly what issues were
22 raised there, because I don't get involved with them until
23 after there's a decision made. I know that under the law, the
24 issue that could be brought there was whether the removal from
25 the Riveras was proper, and what specific issues were brought

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1 there, I don't know yet, Judge.

2 MR. CHARNEY: Your Honor, that reaffirms the fact that
3 the more present inquiry of whether it would be proper to
4 return them now is not a subject of that hearing. The Riveras
5 have not had an opportunity to have that issue addressed
6 anywhere, as Mr. Levine and Mr. Kraft have now acknowledged.
7 All that anyone seems to be focused on is the initial removal
8 decision and no one is doing a more current assessment of
9 whether their home is appropriate. That's the problem, we're
10 not getting a hearing on that issue anywhere.

11 THE COURT: Well, I have to tell you that I'm not
12 clear as to the extent of my power to deal with what I'll call
13 updating. The lawsuit was brought, and I think this is the
14 only way it could be brought, claiming that the removal was a
15 violation of due process.

16 MR. CHARNEY: But we also said that the continued
17 separation was a violation. Because by the time we sued here,
18 we already knew that the OCI report had found everything
19 unsubstantiated, because that happened in July, so by
20 September --

21 THE COURT: You go so fast, I can't follow you.

22 MR. CHARNEY: Your Honor, in our complaint which we
23 feel was clearly pled, we said that it was not only the removal
24 that was unconstitutional, but it was the continued separation
25 of the children from the Riveras, even after the initial cause

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1 for the removal had been invalidated. In other words, this
2 allegation of --

3 THE COURT: Did the OCI make a finding?

4 MR. CHARNEY: Yes, in July.

5 THE COURT: And did the OCI make a finding that there
6 had been no misconduct at all on the part of Johnson?

7 MR. CHARNEY: In July.

8 THE COURT: Did they make a finding that --

9 MR. CHARNEY: Yes. Your Honor, you have it as Exhibit
10 7. It says all of the allegations, I can read it directly for
11 you. All of the allegations are unsubstantiated, all of them.
12 That's the wording they used. Now, there's pages and pages of
13 interviews that they did --

14 THE COURT: All?

15 MR. CHARNEY: Exhibit 7.

16 THE COURT: I don't think that's the case.

17 MR. CHARNEY: If you look at --

18 THE COURT: Because I had that at the time of my
19 September hearing.

20 MR. CHARNEY: Yes, you did, your Honor.

21 THE COURT: Did they deal with the issue about Johnson
22 making sexy remarks to the little children?

23 MR. CHARNEY: Your Honor, I would submit if you read
24 that report from page 1 to -- I don't know, page 24, you will
25 notice that there are notes taken by the investigator with

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1 interviews with all of the girls where they do say things about
2 Mr. Johnson, many of which contradict with each other, and then
3 if you turn to, I believe it's page, let's see, actually, it's
4 at the beginning. If you look at page 4, I believe, page --
5 I'm sorry, not page 4. Page 6. If you look at page 6 of that
6 report, it says under Section C, it says "determination." And
7 it says, "No evidence has been uncovered to substantiate the
8 allegations. OCI has unfounded this case against Leandro
9 Johnson."

10 THE COURT: Where are you reading?

11 MR. CHARNEY: Page six. Do you see where there's a
12 heading that says "unsubstantiated allegations"? It's like a
13 big, bold font, Section C and then it says "unsubstantiated
14 allegations."

15 THE COURT: No, I don't see that.

16 MR. CHARNEY: I don't know if we --Exhibit 7. It's
17 Exhibit 7 to our papers.

18 THE COURT: Exhibit 7 to Ms. Kubitschek?

19 MR. CHARNEY: Yes, and if you look at page 6, I
20 believe.

21 THE COURT: Where does it say "unsubstantiated"? I'm
22 on a different --

23 MR. CHARNEY: The confusing part is there's two page
24 6's, unfortunately.

25 THE COURT: I think there are. Now, let me get your

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1 page 6. Okay. I don't think that is what OCI found.

2 MR. CHARNEY: A couple of pages I would point out,
3 page 4, two pages prior, it lists all of the allegations as to
4 each of the children against both Mr. Johnson and Miss Rivera,
5 and it lists in the far right column the status of all the
6 allegations, that all are marked unsubstantiated.

7 And then lastly, if you turn to the very last page of
8 this report --

9 THE COURT: I would appreciate if you would focus on
10 what I found, not on something some other allegations as far
11 as, you know, literal, whether the children were physically
12 abused. I never found that. Please focus on what I found.

13 MR. CHARNEY: Your Honor, my point --

14 THE COURT: And I don't think I was dreaming.

15 MR. CHARNEY: My point is, your Honor --

16 THE COURT: I'm not interested right now in your
17 point. Where in this material is there -- where does it deal
18 with what I found?

19 MR. CHARNEY: I would look at pages 5 to 7, then, and
20 this would be the second pages 5 to 7, where each of the girls
21 is interviewed about what Mr. Johnson allegedly did, and you'll
22 notice that each of their stories seems to contradict the
23 others, and it is our submission that that piece of it, as well
24 as everything else that they looked at, led them to conclude
25 that nothing had happened, because that's what they -- they

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1 investigated everything. It wasn't just the sexual abuse.
2 They investigated all the things that your Honor is concerned
3 about. They looked into it, and they made a determination that
4 nothing that Mr. Johnson was alleged to have done in fact
5 happened. Because they unsubstantiated everything.

6 MR. KRAFT: That's not correct.

7 THE COURT: You are not helping me at all. It's as if
8 you're talking about a different set of allegations that I'm
9 talking about.

10 MR. CHARNEY: Your Honor is concerned that Mr. Johnson
11 exposed the girls to the inappropriate material --

12 THE COURT: I didn't say anything about inappropriate
13 material.

14 MR. CHARNEY: Said inappropriate things, touched them
15 inappropriately --

16 THE COURT: I didn't say anything about touching.

17 MR. CHARNEY: What is your Honor concerned about what
18 Mr. Johnson has done?

19 THE COURT: Don't you remember what I said on
20 September 14?

21 MR. CHARNEY: Your Honor made reference to
22 Mr. Johnson, I believe, engaging in inappropriate conduct with
23 children. Your Honor correctly pointed out that he may not
24 have sexually abused them, or had intercourse with them, but
25 that he had engaged in some other form of inappropriate

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1 behavior, and it's my submission that this report addresses all
2 of those concerns, the inappropriate behavior that your Honor
3 is concerned about. That's my point. I'm sorry if I did not
4 make myself clear.

5 MR. LEVINE: Your Honor, may I respond?

6 THE COURT: Just a minute.

7 MR. LEVINE: Sorry, your Honor.

8 THE COURT: Do you have the transcript of September?

9 MR. CHARNEY: Yes, I do, your Honor.

10 THE COURT: On page 51, I make findings very favorable
11 to the Riveras, as far as their personal conduct, and down at
12 the bottom, I said, the bottom of the page, there's no evidence
13 at all that they facilitated anything in the way of sexual
14 misconduct.

15 MR. CHARNEY: You're right, your Honor.

16 THE COURT: And then I said the evidence would
17 indicate that as to Mr. Johnson, they forbade him to come back
18 to the building, the building meaning the two dwellings.

19 MR. CHARNEY: Yes.

20 THE COURT: And then I go on on page 52 to say, "But
21 the issue is whether despite all I've said whether there was
22 grounds for the authorities to remove the children, and such
23 grounds can arise despite the best efforts, the best intentions
24 and the good faith of the Riveras. What apparently is the case
25 is that this Mr. Johnson was a very frequent visitor of the

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1 adult daughter in her home, which was in the building and was a
2 separate home from the Riveras. In other words, the adult
3 daughter had her home in this building, and the Riveras and the
4 children they cared for had their home in the other part of the
5 building. But circulation went back and forth and the adult
6 daughter was hardly a stranger to the Riveras. This was their
7 adult daughter. And so the indications are, then, and the
8 facts would appear to be, that this Mr. Johnson visited the
9 adult daughter a great deal and the situation in the Riveras'
10 part of the house was somewhat complicated, because there were
11 two teenaged daughters, Ashley and LaPortia, who were not part
12 of this lawsuit, as well as the three girls under ten years
13 old; Jada, Bryanna and Erica.

14 "It appears that LaPortia accused Johnson in engaging
15 in sexual intercourse with her and this was ultimately reported
16 to the authorities. And on the basis of that report, LaPortia
17 and Ashley and Erica and Bryanna and Jada, all five were
18 removed from the Riveras' home."

19 And then I say, I'll repeat, that there was no
20 negligence or intention on the part of the Riveras. And then I
21 go on: "I believe that the sequence of events was the
22 accusation then the removal of the children and then further
23 development of the facts. And the further development of the
24 facts involved, first of all, LaPortia repudiating her
25 accusation that Johnson had sex with her."

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1 And then I say that, "Nevertheless, there were factual
2 issues," and so forth, at the bottom of 53. And then at the
3 top of 54, I said, "The investigation indicated that although
4 probably Johnson did not have sex with LaPortia, as she accused
5 him of, Mr. Johnson was speaking and acting in a way which was
6 designed to allow some romance with these little girls or two
7 of them and to entice them."

8 Now, that was a very, very brief statement, but -- oh,
9 and page 55. "There was a serious accusation of sexual
10 intercourse, which was later disproven, I guess -- I am
11 certain." I spoke very briefly about Johnson's other conduct,
12 at the top of 54, but it was not brief in my mind, and it
13 seemed, and my memory is that this was supported in the
14 investigative material that was before me.

15 MR. CHARNEY: Your Honor, I guess my question would
16 be, though, all the material you had before you, the
17 investigation you're referring to, had to do with the initial
18 removal itself. Our concern here is that the Riveras don't
19 seem to have any avenue for seeking the return of the children
20 at this point, and your Honor very astutely pointed out, ACS
21 and the State are not providing a process that deals with the
22 current situation. And by current, I mean as of July, when the
23 children had already been removed, this investigation was
24 completed, Ms. Rivera said she had banished Mr. Johnson from
25 the home. There was no ability at that point, there was no

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1 avenue for the Riveras at that point to seek the return of
2 these girls. And the Family Court won't let them have a
3 hearing.

4 As Mr. Kraft just got through saying, the fair hearing
5 is not the proper place, that's just where they can deal with
6 the original removal decision. There is nowhere for the
7 Riveras to go to get a hearing on the issue of whether the
8 girls can come home now. The clock is ticking. It's now been
9 eight months since they were removed. You yourself found the
10 Riveras themselves did nothing wrong, and we're left with a
11 situation where ACS is not providing either a process for
12 seeking return or a substantive reason for why today they won't
13 return the children.

14 We know why they took the children, we don't know why
15 they took them today, and we can't get an explanation from them
16 and we can't get a hearing on this issue and that is a
17 violation of the Riveras' constitutional rights.

18 THE COURT: Let me say this to Mr. Levine. All I know
19 on September 14 was that there was an accusation which
20 justified the removal, and that accusation was the accusation
21 by LaPortia that Johnson had had sex with her, and I felt that
22 that was an indication of enough danger and so forth that it
23 justified the removal. I'm sure that's what I was referring to
24 when I said that the removal was justified. And then I
25 referred to this conduct of Mr. Johnson vis-a-vis the little

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1 children, the three little infants that are involved in this
2 case.

3 But what I really was saying was there were factual
4 issues and it appeared to me then that the authorities were
5 providing a process. Now, it seems to me very clear as a
6 matter of law that due process requires something besides
7 having perhaps issues which justified removal. You can't stop
8 there. There has to be a process to resolve the issues. That
9 is due process. And there has to be some process to resolve
10 issues in some reasonable time, and I don't think the City has
11 that process, and that's the problem. And it was a problem in
12 another case where a huge amount of time went by, and it was
13 very hard to put things back together again. I don't remember
14 what we actually did, but what seems to me absolutely evident
15 is there is no process.

16 What was certainly contemplated by me is that the City
17 authority which did the removal or authorized the removal would
18 engage in a process, reach a resolution and have some finding
19 or conclusion that the removal should be continued. In other
20 words, there was a removal on a particular day, but surely
21 there was an issue about whether that removal should continue,
22 and I contemplated that, and I thought there was a process.

23 I don't think there is any process.

24 MR. LEVINE: Your Honor --

25 THE COURT: I just don't think there's any process at

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1 all, and I've heard this before. The independent review
2 conducted by the State. In the first place, it's woefully late
3 in occurring, and I've heard over and over again that the State
4 doesn't make a decision that is binding on anybody. The State
5 doesn't issue an order to the City, and it's the City who
6 removed and has the responsibility to either keep these people
7 removed or send them back to their foster parents, the Riveras.
8 And there is no process.

9 I've heard of nothing that amounts to me even a
10 semblance of due process.

11 MR. LEVINE: In the first instance, your Honor, we
12 believe that contrary to the position the State takes, the fair
13 hearing judge has the right to require the --

14 THE COURT: Well, that's a nice disagreement. It
15 seems to me -- haven't you told me that, that the State has no
16 authority to order the City?

17 MR. LEVINE: The State says so. The City doesn't
18 believe so.

19 THE COURT: Well, that's a wonderful due process
20 situation, where the State thinks one thing and the City thinks
21 another. Is that due process?

22 MR. LEVINE: Your Honor, the due process from that
23 point --

24 THE COURT: It's a ridiculous process.

25 MR. LEVINE: It is an Article 78 proceeding, and the

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1 state court has the right to do that.

2 THE COURT: Now, look here. Don't tell me about
3 Article 78. There was a valid lawsuit brought in this court
4 alleging violation of constitutional rights, and this court has
5 jurisdiction over such a case, and this court is not going to
6 be told, well, the matter should now go to the state court.

7 MR. LEVINE: Respectfully, I don't want to antagonize
8 the court, but we believe the court lacks subject matter
9 jurisdiction, I must say that for the record, under the
10 domestic relations exemption to federal questions.

11 MR. CHARNEY: Your Honor, that issue has been briefed
12 I think four times and your Honor correctly decided in the
13 Haynes case that that exception does not apply in this
14 situation.

15 THE COURT: We've got to assume, unless the Court of
16 Appeals corrects me, that I have jurisdiction where plaintiffs
17 such as these sue, claiming that there was no due process in a
18 removal of foster children from them, and that's what I've held
19 basically in this case and in other cases, and unless the Court
20 of Appeals holds otherwise, that's my position.

21 Now, the thing is, I want to, I am very much dedicated
22 to the idea that as long as the local authorities are acting
23 with reasonable procedures to ascertain the facts and to make a
24 decision as to whether the removal from the Riveras not only
25 was justified but continues to be justified, that is due

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1 process. But when I hear what has gone on in this case, I
2 don't have confidence that that is occurring.

3 MR. LEVINE: Your Honor, may I --

4 THE COURT: It seems to me that ACS and OCI have
5 really not followed through and made a determination about
6 whether the continued removal is justified. What I believe has
7 occurred is, that they have been concerned almost exclusively
8 about whether the original removal is justified. So if you can
9 point out to me some finding, it doesn't have to be current as
10 of today, but some finding that follows up the aftermath of
11 that removal, and makes a finding as to whether or not the
12 continued removal from the Riveras is justified, I would be
13 most glad to see it. Is there such a finding?

14 MR. LEVINE: Your Honor, as you pointed out at the
15 beginning of this argument, we view this as a motion for
16 reconsideration and not really an application for a new
17 injunction. I would like a week's adjournment to respond to
18 the Court with respect to this.

19 MR. CHARNEY: Your Honor, whether or not this is, what
20 kind of motion it's treated as, the City has now been on notice
21 for, we filed this motion, I believe the beginning of October,
22 in which we brought all these issues to the Court's attention,
23 the later events, the more recent events. So the City has had
24 now two months to respond to it, and they have not addressed it
25 in either of their responsive sets of papers.

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1 THE COURT: Let me say this --

2 MR. LEVINE: Your Honor, that's because --

3 THE COURT: Let me say this.

4 MR. LEVINE: Sorry.

5 THE COURT: I don't think it was just a little minor
6 semantic difficulty. I think to call this a motion for
7 reconsideration really was making the wrong motion. And that
8 has some consequences. What I will do is to grant a week
9 adjournment, and what I would like to do is to follow this
10 closely. We will have a hearing in a week, and either that day
11 or -- I don't want to ruin anybody's weekend -- that day or the
12 previous Friday, but I need to have information in response to
13 my question, and that is has ACS or any entity within ACS made
14 a finding as to whether the continued removal from the Riveras
15 of these three girls is justified.

16 MR. LEVINE: Your Honor --

17 THE COURT: And that is my question. I'd like it
18 answered, and as far as the State is concerned, I would like to
19 know from the State everything that can possibly be known by a
20 week from now about the independent, what do you call it,
21 review.

22 MR. CHARNEY: The fair hearing, your Honor.

23 THE COURT: The fair hearing.

24 MR. LEVINE: May I, your Honor --

25 THE COURT: Just a minute. The fair hearing. I will

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1 say I am directing the State to have some finding by a week
2 from today. This has gone on too long, and if they can't
3 produce something at this late date, then I will rather be
4 inclined to say that the State is not providing due process. I
5 want some finding from the fair hearing by a week from today.
6 That is a direction. We'll have a hearing a week from today,
7 and that's the direction of the Court.

8 Thank you very much.

9 MR. CHARNEY: Just one other matter, your Honor.

10 THE COURT: What?

11 MR. CHARNEY: I just wanted to ask, this hearing that
12 we have a week from now, is there going to be testimony and the
13 opportunity to question witnesses? In other words, if ACS
14 provides you with some kind of documentation or finding, would
15 we have the opportunity to question the people that wrote that
16 report? Because otherwise --

17 THE COURT: No. Not then. Let's see. What should
18 come out of this process, if there is a process, and I'm not
19 really sure there is anything, but what there should be, not
20 witnesses coming in here, but there should be written
21 descriptions of what investigation or inquiry has taken place,
22 and findings. That's the kind of thing that one would expect
23 from these agencies, and that's the kind of thing that my
24 problem is, that doesn't exist. I hope it does exist, but
25 that's a very different thing than having a bunch of people

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1 come in who should be rendering reports and so forth, and
2 testifying. I don't want that next Monday.

3 (Adjourned)

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 MABEL and ANTHONY RIVERA,

5 Plaintiffs, . New York, N.Y.

6 v.

06 R. 7077 (TPG)

7 MATTINGLY, et al., etc.,

8 Defendants.

9 -----x

10 December 11, 2006
11 2:45 p.m.

12 Before:

13 HON. THOMAS P. GRIESA,

14 District Judge

15 APPEARANCES

16 LANSNER & KUBITSCHK

17 Attorneys for Mabel and Anthony Rivea,
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19 CAROLYN KUBITSCHK,
20 of Counsel.

21 BROOKLYN LEGAL SERVICE CORPORATION A,
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6CBCRIVH

1 (Case called)

2 MR. CHARNEY: Darius Charney, Lansner & Kubitschek on
3 behalf of plaintiffs Mabel and Anthony Rivera as well as also
4 infant plaintiffs ES and BC.

5 MS. KUBITSCHKEK: Carolyn Kubitshek also from Lansner &
6 Kubitschek for the plaintiffs.

7 MS. BARRIE: Susan Barrie, Brooklyn Legal Services
8 Corporation A, for Latoya Chapman-Young, biological mother of
9 Jada Chapman.

10 MS. MOSER: Theresa Moser, Legal Aid Society, for the
11 infant Jada.

12 MR. KRAFT: Robert Kraft From the New York State
13 Attorney General's office for the state defendant, Commissioner
14 Johnson.

15 MR. LEVINEE: Joseph Levine, Assistant Corporation
16 Counsel, for the city defendants

17 THE COURT: Do we have to refer to these initials? I
18 thought we were referring to names. I don't understand the
19 initials.

20 MR. CHARNEY: The reason we are doing that, your
21 Honor, we can stop it for the hearing, but the caption now
22 reads, instead of the full names of the children, it has the
23 initials. The caption was amended to comply with, I guess, the
24 district's privacy rules with respect to child parties. I have
25 no objection to referring to them by name. I am sure it's

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1 easier for your Honor, so --

2 THE COURT: At least today. Is it J-a?

3 MR. CHARNEY: J-a-d-a. Then you have Erica,
4 E-r-i-c-a, and then Bryanna, B-r-y-a-n-n-a.

5 THE COURT: Those are the three?

6 MR. CHARNEY: Yes.

7 THE COURT: Ms. Moser, you represent?

8 MS. MOSER: Jada.

9 THE COURT: And Mr. Charney and Ms. Kubitshek, you
10 represent Erica and Bryanna?

11 MR. CHARNEY: Yes, your Honor.

12 THE COURT: As well as --

13 MR. CHARNEY: Mabel and Tony Rivera.

14 THE COURT: Refresh my memory also. Ms. Rivera is
15 what relation to --

16 MR. CHARNEY: Mr. and Mrs. Rivera are the great-aunt
17 and great-uncle of the three girls, on the -- I guess maternal
18 great-aunt and great-uncle; so they are -- the mothers of the
19 children are the nieces of Mr. and Mrs. Rivera.

20 THE COURT: The mothers plural?

21 MR. CHARNEY: Yes. Erica and Bryanna have the same
22 mother and Jada has a different mother. The relationship of
23 the three girls to each other is that Erica and Bryanna are
24 first cousins of Jada.

25 THE COURT: You name again?

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1 MS. BARRIE: Susan Barrie. My client is the
2 biological mother of Jada Chapman. Her name is Latoya
3 Chapman-Young.

4 THE COURT: How do you spell your last name?

5 MS. BARRIE: Barrie, B-a-r-r-i-e.

6 THE COURT: Your client's name again?

7 MS. BARRIE: Latoya Chapman-Young with a hyphen.

8 THE COURT: She is the mother of --

9 MS. BARRIE: Jada.

10 THE COURT: Any developments since last week or last
11 time we were together?

12 MR. KRAFT: Your Honor, I left with the court clerk a
13 transcript of the hearing which is completed. I am submitting
14 it for in-camera -- for your in-camera review. I have given
15 copies to the other parties, and in my declaration I am
16 requesting that your Honor permit me not to file it now since
17 it's large and since it's unredacted, and I request that
18 anybody -- you order that if they use it, attach it to papers,
19 that they do the redacting based on what pages they need to put
20 in. This was a four-day hearing. It was completed on November
21 7.

22 THE COURT: Just a minute. This is called what kind
23 of hearing?

24 MR. KRAFT: This is called an administrative hearing
25 before the Commissioner of the Office of Children and Family

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1 Services.

2 THE COURT: It started when?

3 MR. KRAFT: Started on -- well, started -- the first
4 formal hearing date was October 2. Apparently there were some
5 appearances by some attorneys but not all the attorneys were
6 there on prior dates, but the first date evidence was taken was
7 October 2. Apparently the hearing was requested in the spring,
8 but the plaintiffs asked to adjourn it for a couple of months
9 pending the report from the city's Office Of Confidential
10 Investigation.

11 That report, as your Honor is probably aware, didn't
12 come to plaintiff, so they had requested to put the hearing
13 off, and the hearing was supposed to start on September 18, but
14 Mr. Eyrman -- I believe that is spelled E-y-r-m-a-n -- who is
15 not here today, is the counsel for the agency defendants.

16 THE COURT: The city?

17 MR. KRAFT: Not the city, the city subcontractor. I
18 forget the name of it. It's in the caption. Family Support
19 Services or whatever they are. He is the counsel and he could
20 not appear at the hearing on September 18 because he was in
21 Family Court on this matter; so it was adjourned from September
22 18 and it started on October 2. They had three more dates and
23 the last one was November 7.

24 The administrative law judge got the transcript,
25 reviewed it and wrote a draft decision. The commissioner said

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1 he'd sign the decision, I am told, on December 6. It has been
2 sent up to Albany. The decisions the different commissioner's
3 designees around the state write, they get sent to Albany to
4 one office where they get sequentially numbered and actually
5 issued. They get date-stamped and issued by a single office in
6 Albany. That decision should be issued shortly. I hoped that
7 it would be issued today, but that has not happened.

8 I can tell you the outcome of the decision. The
9 administrative law judge took a lot of testimony, including
10 some testimony from some city witnesses who were brought to
11 that hearing, I am not quite sure how, whether it was by
12 subpoena or otherwise, but the city employees testified and
13 agency employees testified, and I believe people testified on
14 behalf of the plaintiffs here, what they call the appellants in
15 the fair hearing, and the administrative law judge determined
16 that the removal was arbitrary and capricious, and she, the
17 administrative law judge, directed that the matter be remanded
18 to the city to examine the current circumstances of the
19 foster children, both the current foster care placement and the
20 Riveras, and the city has sixty days to make a decision about
21 the best place for these children.

22 That is the gist of what the decision says.
23 Obviously, there is reasoning behind that which I don't have
24 with me today.

25 THE COURT: OCI is the Office Of Confidential

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1 Investigation; is that right?

2 MR. KRAFT: Yes, Judge. That is a city agency.

3 THE COURT: When was the OCI ruling? Mr. Levine, do
4 you remember that?

5 MR. LEVINE: I believe it was in July, your Honor.

6 THE COURT: July? It seems to me we are faced with a
7 problem that I think came up in another case, and that is that
8 the original removal may have been a violation of due process,
9 and then there is process within the city and the state system
10 and it takes a long time for various reasons, maybe not with
11 anybody's fault particularly. Then, at least in this case, we
12 have exactly the posture that has just been described, and the
13 issue is, does the federal court intervene now, or does the
14 federal court allow the process to conclude? What is the
15 answer to that?

16 MR. CHARNEY: Your Honor, if your Honor recalls from
17 the prior case where this exact same situation came up, what
18 happened was once the state made the rulings that the removal
19 was arbitrary and capricious and then sent it back to the city,
20 the city after 60 days, I guess, produced a report which the
21 plaintiffs in that prior case took a lot of issue with the
22 facts in that report. However, there was no process for the
23 plaintiffs at that point to contest those findings because the
24 state's position was a fair hearing was held, it issued a
25 decision, and it sent it back to the city, because in the

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1 state's view, the city makes the final decision and that at
2 that point the state's involvement was done. So there was no
3 opportunity for the plaintiffs in that prior case to be heard
4 on what the city did after the case came back to it.

5 THE COURT: What did the city do?

6 MR. CHARNEY: In that case the city recommended that
7 the children not be returned to that foster mother. We came
8 before your Honor, I believe it was May 23 of this year, this
9 is in the Haines v. Mattingly case, I believe your Honor has
10 the transcript from that hearing as an exhibit in this case,
11 and again, the state and the city both stated that, you know,
12 at this point there were no more administrative processes for
13 the plaintiffs to pursue, and your Honor in that case ruled
14 that because there was no due process left for the plaintiffs,
15 no recourse, that the federal court would have to intervene at
16 that point and the federal court would have to decide that
17 issue, and just last week in this case --

18 THE COURT: What did I do?

19 MR. CHARNEY: You set a trial date for, I believe it
20 was July 31 to decide whether the children should be returned
21 to the plaintiffs or whether they should remain in their new
22 foster home, which was with nonrelatives. The plaintiffs and
23 the city were able to resolve the case prior to trial and the
24 children -- I am sorry the child was returned to plaintiff. So
25 the trial was not held, but your Honor had scheduled it.

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1 What I wanted to point out in this case though, your
2 Honor, is that last week your Honor directed the city by today
3 to provide an answer to your question as to whether the
4 continued removal of these three girls from the Riveras was
5 justified, and you have had a declaration, I believe, in front
6 of you that the city submitted this past Friday stating that
7 they don't have any other processes other than what they have
8 already done, and what they have already done admittedly they
9 admitted was just to look at the removal itself back in March
10 and April. They have not looked into the current
11 circumstances. So still yet nobody has done that.

12 THE COURT: But it has gone to the state, and the
13 state has made a finding, and I gather from what was said that
14 the city would have responsibility now to decide what should be
15 done. Isn't that right, Mr. Levine?

16 MR. LEVINE: Yes, your Honor.

17 MR. CHARNEY: But, your Honor, respectfully, that is
18 exactly what your Honor took issue with in the prior case. You
19 were very irritated by that scenario. You felt that that was
20 not adequate due process because you are giving it back to
21 essentially the same agency that made the wrong decision in the
22 first place and is not a objective decision-maker, and the
23 state effectively abdicated its responsibility to provide a
24 real remedy to the plaintiffs.

25 The remedy that the plaintiffs were searching for when

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1 they asked for this fair hearing was to have the children
2 returned to them, and the state believes it does not have the
3 authority to do that. It won't order that even though the city
4 ruled that removal was improper.

5 THE COURT: Let's go back to the prior case. I could
6 be wrong, I could be completely wrong, but my memory is that
7 the record was somewhat different from what it is today, and my
8 memory is that the state fair hearing was really in a vacuum.

9 MR. CHARNEY: In the prior case you mean?

10 THE COURT: In the prior case, and that nothing was
11 going to be done by the state or by the city. Am I right or
12 wrong?

13 MR. CHARNEY: Well, in the prior case, your Honor, you
14 are correct that in that hearing they focused on the original
15 removal, and last week Mr. Kraft stated that that's what they
16 do in fair hearings: They examine the original removal
17 decision at that time, and your Honor questioned both
18 defendants as to what about looking at the current
19 circumstances because the Riveras are seeking return of the
20 children now, and you had asked --

21 THE COURT: You are talking about what was done in the
22 prior case?

23 MR. CHARNEY: Well, in the prior case, that was part
24 of the problem, they only looked at the original decision.

25 THE COURT: Right.

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1 MR. CHARNEY: And then they sent it back to the city,
2 and your Honor felt that was not an adequate process, and they
3 are doing the exact same thing in this case. The Riveras are
4 seeking return of the children. That is the only reason they
5 pursued a fair hearing, because these are their grand-nieces,
6 they want them to live with them, and they don't have any
7 recourse in Family Court, state Family Court. They only have
8 this administrative process.

9 In the Family Court they asked for a hearing on the
10 issue that your Honor is interested in, which is whether the
11 children should come back now. The Family Court refused to
12 hear it. You have the decision from the Family Court judge
13 from, I believe it was November 29, stating that the Riveras
14 don't have a right to a hearing in Family Court. It's Exhibit
15 9, I believe plaintiff's Exhibit 9, so there really is no
16 forum.

17 THE COURT: Let me just get Mr. Kraft. Mr. Kraft, two
18 questions: Does the decision deal at all with what should be
19 done now or just deal with whether the removal was right or
20 wrong?

21 MR. KRAFT: The decision discusses the testimony of
22 people who testified at the hearing, which was in October of
23 2006, which is a lot more current than the removal date, and
24 the hearing judge assessed credibility and found some people
25 not credible and some people more credible, so she brought her

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1 findings up to her hearing date. The final decision was that
2 the city has to apply the law and the facts that it knows about
3 the current foster placement, which were not discussed at the
4 hearing, and the Riveras' foster home, which was discussed at
5 the hearing. The city has to decide what to do with this
6 child.

7 THE COURT: In other words, the decision does not make
8 any finding, conclusion, or recommendation about what should be
9 done now; is that right?

10 MR. KRAFT: Not beyond directing the city to consider
11 both foster homes. It doesn't pick a particular thing, and the
12 reason it doesn't --

13 THE COURT: That is fine, but does the decision direct
14 the city to do something or just leave it up in the air?

15 MR. KRAFT: It directs the city to make a decision
16 within 60 days about the appropriate placement of these three
17 foster children based on current circumstances.

18 The city -- before saying that, the decision takes
19 some pains to criticize the city for the removal, and so if you
20 read that decision along with whatever current investigation
21 the city may do, the city may be well inclined to re-place
22 these children with the Riveras; but the state's position
23 continues to be that whether these plaintiffs, the Riveras,
24 that is, like it or not, custody of these children is not now
25 in the Rivera family. Custody of these children is with the

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1 local Commissioner of Social Services, and the state does not
2 believe that the law empowers it, the state, to tell a local
3 commissioner where to place the children.

4 THE COURT: All right, fair enough. I understand.

5 MR. KRAFT: That is the position.

6 THE COURT: All right, let's forget about the prior
7 case. There may be some similarities, some differences, but we
8 are talking about this case now. Mr. Levine, what will happen
9 now in view of what Mr. Kraft has said? What will happen on
10 the City's side?

11 MR. LEVINE: The city will conduct a full
12 investigation of the Riveras' home and the current placement,
13 and decide which is appropriate. I think it's very important
14 that that be done for the following reason, your Honor:
15 Although the infant Jada and her mother want to go back to the
16 Riveras, the other two, Erica and Bryanna, do not want to go
17 back to --

18 MR. CHARNEY: That is not true, your Honor.

19 THE COURT: Wait a minute. One at a time.

20 MR. CHARNEY: That is not true. I want the record to
21 reflect that is not true.

22 THE COURT: Why don't you let Mr. Levine speak.

23 MR. LEVINE: They brought counsel prepared, and they
24 had not brought counsel for the infants and anyone else, and
25 there is a big difference, your Honor. The permanency plan

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1 with respect to Erica and Bryanna is return to the mother. The
2 permanency plan --

3 THE COURT: Permanency plan developed by whom?

4 MR. LEVINE: By the court.

5 THE COURT: The Family Court?

6 MR. LEVINE: Yes. So that they don't -- the birth
7 mother of Erica and Bryanna and her attorney put in an
8 affidavit in the Family Court opposing the information, is that
9 they don't want those children to go back, whereas Jada's
10 representative indicated they do want her to go back. So it's
11 important that the Commissioner be given the leeway to do that
12 investigation.

13 Further, your Honor, what Mr. Charney said was not
14 quite accurate about the city's position. The city strongly
15 believes that the Family Court does in fact have the
16 jurisdiction to deal with the issue, and in the declaration of
17 submitted on Friday, stated that the city will be moving by
18 order to show cause this week to renew the motion originally
19 made by the plaintiffs to ask the Family Court to consider the
20 re-placement to the Riveras.

21 THE COURT: Re-placement of whom?

22 MR. LEVINE: Re-placement of all of the children.

23 THE COURT: What does that mean? What is the effect
24 of that application to the Family Court?

25 MR. LEVINE: The effect of that is the Family Court

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1 will hold the best-interests hearing that your Honor is
2 concerned with to determine what the placement should be during
3 the pendency of the permanency claim.

4 MR. CHARNEY: Your Honor, may I respond?

5 THE COURT: Wait a minute. Has the family court made
6 any ruling about this foster care situation at all, Mr. Levine?

7 MR. LEVINE: No.

8 THE COURT: All right. Then the city is going in and
9 asking the Family Court to rule on what is the best foster the
10 situation?

11 MR. LEVINE: Yes, your Honor. We have agreed with
12 plaintiffs' position that they have asserted in the Family
13 Court, that the Family Court did have jurisdiction. We believe
14 the referee who denied the application improperly applied the
15 Family Court Act.

16 THE COURT: In other words, the plaintiff here went to
17 the Family Court and the referee denied it?

18 MR. LEVINE: The referee declined to hear them saying
19 they have did not have standing. We believe that certainly
20 with respect to Jada they do have standing, and we will
21 encourage the Family Court to hear that.

22 THE COURT: I don't understand why at this date the
23 city suddenly goes to Family Court.

24 MR. LEVINE: Because, your Honor, we believe -- I am
25 sorry --

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1 THE COURT: If it had gone to the Family Court a long
2 time ago, if you want to go to the Family Court, what is the
3 sense of going all these months after the removal?

4 MR. LEVINE: Your Honor, the city still believes the
5 removal is correct, the issue that your Honor raised is what
6 happens now in the context of the current placement. We did
7 not oppose the plaintiffs' application, and maybe that was a
8 mistake we made in the Family Court, but we are now going to
9 permanently -- and it's only a week after the decision at
10 essentially.

11 THE COURT: When was the removal, by the way?

12 MR. CHARNEY: March 31. It's been over eight months,
13 and still no hearing, your Honor, on the issue of whether the
14 children should go back.

15 THE COURT: Do I understand then that the city is not
16 going to have its own investigation, but is turning the matter
17 over -- trying the turn the matter over to the Family Court?

18 MR. LEVINE: It will follow the dictates of the fair
19 hearing administrative judge. We believe that the Family Court
20 determination would supersede that if in fact it made a ruling
21 on the current placement.

22 THE COURT: I take it the city has the power to
23 conduct an investigation, right?

24 MR. LEVINE: Yes, your Honor, absolutely.

25 THE COURT: And come up with a conclusion, right?

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1 MR. LEVINE: Yes, your Honor.

2 THE COURT: My question is, is the city going to do
3 that or not going to do it?

4 MR. LEVINE: It is going to do that.

5 THE COURT: And at the same time it is going into the
6 Family Court and asking the Family Court to do it?

7 MR. LEVINE: We are asking that if the Riveras want a
8 Family Court hearing, that they get it.

9 MR. CHARNEY: The Riveras already asked for it three
10 months ago, your Honor, and the city just stood silent. They
11 didn't do anything. They were invited to brief this issue in
12 the Family Court by October 27. They submitted nothing.

13 THE COURT: They were invited by the referee?

14 MR. CHARNEY: Yes, your Honor, and it's very
15 interesting that Mr. Levine's declaration essentially quotes
16 the Riveras' brief to the Family Court, so I don't know what
17 new arguments the city plans on presenting to the Family Court
18 to get it to change its mind. In fact, I would submit that
19 under state law the Family Court was correct, the Riveras do
20 not have a right to a hearing, and that is exactly why we are
21 in federal court.

22 THE COURT: Why?

23 MR. CHARNEY: Because under the New York State Family
24 Court Act, someone in the Riveras' position, a former foster
25 parent, is not a party to the child neglect proceeding

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1 involving the child. In other words, they do not have standing
2 to make motions, to cross examine witnesses, to participate in
3 these proceedings. Therefore, the Family Court was correct as
4 a matter of state law to deny the Riveras as hearing. That is
5 why we brought this lawsuit, because we believe the current law
6 of New York State, both in the administrative context and in
7 the Family Court context, is unconstitutional. It does not
8 recognize -- this is not just a foster care relationship. This
9 is a family relationship. These are grand-nieces of the
10 Riveras. This is a blood relationship that is entitled to
11 constitutional protection. The Second Circuit ruled that 24
12 years ago. And that's why we are here, your Honor, because
13 they are not being heard anywhere. They are not getting a
14 hearing, they are not allowed to call witnesses to testify, to
15 present evidence about whether or not the children should be
16 returned now.

17 If the city does its own investigation, that doesn't
18 give the Riveras the opportunity to respond, to confront the
19 people that do that, to present their version of the facts.
20 They have not been allowed to do that yet. The state won't
21 rule on the issue. They are giving it back to the same agency
22 that removed the children in the first place. They are not
23 giving it to a neutral decision-maker. Due process requires a
24 neutral decision-maker. There is no due process here that
25 satisfies the Fourteenth Amendment for the Riveras.

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1 THE COURT: What do you say the process should be?

2 MR. CHARNEY: If this were an ideal world, I would
3 like for the Family Court to hold a hearing to do what is
4 similar in the context of when you have had a parent whose
5 child is taken from them. They can immediately request a
6 hearing, get it within, I believe, 72 hours, and the court will
7 make a ruling on whether the child should be returned.

8 I would like for relatives who are also entitled to
9 constitutional protection to have that sort of hearing. They
10 can't have a Family Court hearing, the administrative hearing
11 doesn't contemplate as a remedy returning the children. That
12 is the only remedy that the Riveras are seeking, that is the
13 only remedy that will make them whole. That's what due process
14 requires, remedying a deprivation of liberty, and the only
15 remedy is reuniting a family that was torn apart unjustifiably,
16 and there is no process that I have heard when you have had a
17 neutral decision-maker who is deciding whether or not the
18 children should be returned to the Riveras.

19 Allowing the city to investigate it is one thing, but
20 the Riveras have to have the opportunity to respond to whatever
21 the city presents, and that is not what the state is ordering.
22 They are not saying, go do the universe and then bring it back
23 to us. They are saying, you investigate it, you decide.

24 THE COURT: In other words, the investigation is an
25 investigation, not a hearing?

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1 MR. CHARNEY: It's not a hearing, and we have the
2 right to a hearing as a constitutional matter.

3 THE COURT: Mr. Kraft?

4 MR. KRAFT: Your Honor, it may do us some good to step
5 back here since Mr. Charney is raising the concept of the
6 family. This family, including the Riveras, knew about the
7 mothers of these two children a long time before the state did,
8 and the Riveras as family members probably knew that these two
9 mothers, one Latoya and the other is named Ramona, just so you
10 have the names, two mothers. They probably had a sense as
11 family members who knew these women that there were problems
12 with these women and their children. There were a lot of
13 things that the Riveras as family members could have done
14 without getting the state involved. They could have said to
15 these mothers, look, you are having trouble with your child, if
16 you leave it with me we will raise your child, see your child.
17 They could have done a number of remedies as a family within
18 the constitutionally protected sphere of family, and if they
19 had done knows things, they would be like Mrs. Moore, the
20 grandmother you read about in Moore v. City of East Cleveland
21 who is dealing with family matters without state involvement.

22 The real problem in this case, Judge, is that the
23 Riveras did not do that soon enough, and the children were
24 removed from these two mothers for reasons. I don't know
25 whether they were good reasons or not. They were removed from

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1 these mothers. One mother surrendered the child and the state
2 did get involved, and custody was transferred not to the
3 Riveras but to the Commissioner.

4 THE COURT: What happened that got the state involved?

5 MR. KRAFT: Because the Riveras did not deal with the
6 problem of their great-nieces without state involvement.

7 THE COURT: I don't understand it.

8 MR. KRAFT: They knew before the courts got involved.

9 THE COURT: Did they kidnap the children or what did
10 they do?

11 MR. KRAFT: The state you mean?

12 THE COURT: No, the Riveras.

13 MR. KRAFT: No, the state removed these children from
14 their mothers for -- I believe one was a removal and one might
15 have been a surrender. I am a little hazy.

16 THE COURT: The state?

17 MR. KRAFT: The city, I am sorry, the city did it.
18 The city did that as provided by state law and --

19 THE COURT: Who asked them to do that?

20 MR. KRAFT: There must have been reports made about
21 the care that the mothers were giving these children. Frankly,
22 that's beyond the record in this case. I honestly don't know
23 why these children got removed from Latoya and Ramona.

24 THE COURT: You are saying that the Riveras should
25 have simply gone to the mothers and said, "Please allow us to

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1 raise these children?"

2 MR. KRAFT: As family members in a constitutionally
3 protected family, that is what could have happened, and if it
4 had happened, we wouldn't be here because the Commissioner of
5 the New York City department would not have gotten custody of
6 these children.

7 THE COURT: That is pretty much ancient history, and
8 we don't know why, maybe the mothers would not have given --
9 maybe they refused. Who knows at this point? Do you know?

10 MR. KRAFT: No, I don't know.

11 THE COURT: We don't know. So that is pretty much it.
12 The fact is that I gather, unless somebody corrects me, that
13 the city did remove the children from the natural mothers and
14 give them to the Riveras as foster parents. I don't hear any
15 dissent from that state of facts, so that was done. We can't
16 undo that. That is where we are now, so let's go from there.

17 MR. LEVINE: Your Honor, I wanted to make one
18 correction of something Mr. Charney said. In the previous case
19 what you did is refer it to a magistrate. Apart from that,
20 your Honor --

21 THE COURT: Not much difference.

22 MR. LEVINE: Apart from that, your Honor, we believe
23 that the investigation constitutes due process.

24 MR. CHARNEY: Under what basis? Not a hearing.

25 THE COURT: Why don't you let Mr. Levine speak?

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1 MR. CHARNEY: I am sorry.

2 THE COURT: He has been very orderly, hasn't done
3 anything wrong today so let's let him speak.

4 MR. CHARNEY: I apologize, your Honor.

5 MR. LEVINE: I apologize for the last time, your
6 Honor.

7 The Court of Appeals of New York has said that the
8 independent review fair hearing and Article 78 proceeding
9 constitutes due process in this kind of case. Plaintiffs have
10 chosen not to seek an Article 78 proceeding. In that instance
11 I believe that if in fact the state should mandate return, they
12 could ask the Appellate Division to do that, so that's one
13 avenue. The second avenue is the investigation.

14 THE COURT: What would they bring an Article 78
15 proceeding about?

16 MR. LEVINE: To mandamus the fair hearing, Judge, to
17 determine whether the child should be returned. That is the
18 relief they want, and if it was arbitrary and capricious for
19 the fair hearing judge to say the city was completely wrong and
20 leave no remedy, the state court could remedy that wrong and
21 say that it was arbitrary and capricious not to direct that.

22 And the second thing, your Honor, is that we did not
23 object to them appearing in the Family Court. We supported it.
24 We didn't submit papers before. We would support it now, and
25 it would be our policy to seek this kind of hearing. They have

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1 a specific statutory right on behalf of Jada to seek that kind
2 of relief because the statute, Section 1089 of the Family Court
3 Act, specifically provides that in addition to his other powers
4 of temporary placement, that where there is a child presented
5 for adoption the court can direct that the child been placed in
6 the home of the prospective adoptive parents; so we believe at
7 this point, your Honor, there still is due process available to
8 the plaintiffs in both the Family Court and through the fair
9 hearing process.

10 MR. CHARNEY: Your Honor, Ms. Moser I think wants to
11 speak.

12 THE COURT: Yes.

13 MS. MOSER: Your Honor, if I could just be permitted
14 to make a couple of points: First, I think that an
15 investigation at this point would not only not be due process,
16 but it would also be a continuing harm, a continuing violation
17 of my client's liberty interest in her family relationship. At
18 this point, both my client, Jada, and the Riveras have brought
19 themselves to the attention of both the city and state
20 adequately so that the city and state should be well aware of
21 what issues are involved, and have had ample opportunity to
22 assess the situation as it currently stands, and whether there
23 would be any risk to my client in being returned to the
24 Riveras' home -- I would venture to say that --

25 THE COURT: How old is Jada now?

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1 MS. MOSER: She is nine years old.

2 THE COURT: Are you acquainted with her?

3 MS. MOSER: I have not yet met her personally. She
4 has a law guardian. Based on my communications with Jada's law
5 guardian in Family Court, I am able to represent to your Honor
6 what her position is with regard to these matters.

7 THE COURT: You mean Jada's position?

8 MS. MOSER: Jada's position is that she wants to
9 return to the Riveras immediately.

10 THE COURT: Where is she now?

11 MS. MOSER: She is in a nonkinship foster home in a
12 different borough from where the Riveras reside. She has not
13 been provided with regular visitation with the Riveras despite
14 the fact that the city represented in Family Court that that
15 would be provided. She has also has not been freely permitted
16 to communicate with them by telephone.

17 I would submit that all of these things further the
18 harm that is caused by the removal itself and make even more
19 urgent the need for this court to order that Jada be returned
20 to the Riveras immediately. I haven't heard any of the
21 parties, your Honor, submit a single factual assertion that
22 would militate against returning Jada to the Riveras.

23 THE COURT: I said we would go back to the previous
24 case. Wasn't there a case where there was a question about the
25 physical capacity of the foster --

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1 MR. CHARNEY: You are absolutely correct, your Honor,
2 and I would submit in this case, this is an even more
3 open-and-shut case. In other words, there are literally no
4 factual issues that really arise here as to whether it's
5 appropriate to return the children.

6 THE COURT: I haven't heard anything to date that the
7 Riveras are in any way improper or incapable as far as being
8 foster parents, and when I denied the original motion it was
9 solely on the ground that -- well, there were two grounds: I
10 held that the accusation of sexual intercourse directed against
11 that young man, that was a ground for removal, it raised
12 factual issues; and I also said that the indication in a report
13 that maybe this young man was acting enticingly to the little
14 girls, that raised factual issues.

15 All I had said though was that there were factual
16 issues, and by the time of my decision the accusation of sexual
17 intercourse had been completely withdrawn. So that was gone,
18 and all I said was that there were factual issues, and that it
19 appeared to me that the city was pursuing those factual issues
20 in a way that comported with due process, but the only factual
21 issues that existed were these issues about the possible sexual
22 problems, and there was no information in the record at all
23 about any inability or incapacity or any anything else
24 derogatory in the least degree against the Riveras, and in my
25 finding I said over and over that as far as the Riveras

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1 themselves were concerned, they were totally innocent as far as
2 any of the possible sexual aspects of this.

3 What really has happened is that I think the record
4 sustains the idea that this young man has been forbidden to
5 come into the dwelling, and the Riveras have tried to
6 successfully remedy that problem. I haven't heard a word about
7 any dangerous situation about child abuse that could possibly
8 exist now.

9 I am not going to dictate a ruling right at the
10 moment, but it seems to me everything points in the direction
11 in this case for the return of Jada. Now, the other two, what
12 is the situation about Erica and Brian?

13 MR. CHARNEY: Your Honor, Mr. Levine was correct that
14 the "permanency" goal for them is to be returned to first
15 mother. What that means that both ACS and the contracting
16 foster care agency, which is known as Family Support Systems,
17 are actively working with Erica and Bryanna's mother to try to
18 prepare her to have the children come back and live with her.
19 The problem is that that has not happened yet. In fact, every
20 six months in the Family Court there is what is called a
21 permanency hearing for Erica and Bryanna in which this case is
22 reviewed and there is updates given about the progress being
23 made, and that this has been going on for some period of time,
24 I believe now a few years.

25 The most recent permanency hearing I think was in -- I

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1 want to say in August -- I think that is the last one, and
2 again they reaffirmed that the goal is return to the mother.
3 It hasn't happened yet. The children have been away from the
4 Riveras for eight months now. There is another permanency
5 hearing on January 9. Neither the city nor Family Support have
6 given any indication that they are anywhere close to returning
7 the children to -- Ms. Ramona Chapman is that mother.

8 Our position, and the reason we brought this case is
9 not to prevent the children from returning to their mother.
10 Obviously, their own mother has the most superior rights to
11 having them in her home. She is the mother, she has the right
12 to care for her children unless her rights are terminated. Our
13 position is that if the children are not returned to their
14 mother or are currently not living with their mother, they
15 should be living with the Riveras. That is their blood
16 relatives. They had been living with them for six years prior
17 to being removed.

18 THE COURT: How old is Erica?

19 MR. CHARNEY: Erica is now I believe eight years old.
20 She was born in -- I am sorry, yes, eight years old. She was
21 born in January of 1998. She will be nine.

22 THE COURT: How old is Bryanna?

23 MR. CHARNEY: Bryanna is six years old.

24 THE COURT: Back to Jada, how old is Jada?

25 MR. CHARNEY: Jada is nine.

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1 THE COURT: You represent Erica and Bryanna?

2 MR. CHARNEY: Yes.

3 THE COURT: Are you acquainted with Erica and Bryanna?

4 MR. CHARNEY: I am not, but the Riveras, who are in
5 the front row there, are.

6 Your Honor, I will state for the record now that it is
7 before your Honor that transcript that your Honor has before
8 you from the fair hearing, there is testimony in that
9 transcript by I believe a case worker for the foster care
10 agency Family Support Systems, stating that Bryanna had
11 expressed to her a desire to return to live with Mr. and Mrs.
12 Rivera. That was following their removal. So for Mr. Levine
13 to say that Erica and Bryanna did not want to return, I don't
14 think that is anywhere close to being true.

15 THE COURT: I am not trying to criticize anybody. But
16 Erica and Bryanna are your clients?

17 MR. CHARNEY: Yes.

18 THE COURT: And can't you talk to them so that you
19 could tell --

20 MR. CHARNEY: The problem is we are not permitted, the
21 city or the foster care agency, to do that.

22 THE COURT: Who said so?

23 MR. CHARNEY: The city and the foster care agency
24 won't allow us to. They are represented in Family Court by a
25 law guardian, and I want to point out, your Honor, that every

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1 single motion paper, pleading, that the plaintiffs have filed
2 in this case, has been forwarded to the law guardian for Erica
3 and Bryanna. She was notified of the fair hearing --

4 THE COURT: Who is the law guardian?

5 MR. CHARNEY: Her name is Christine Marshall. She is
6 an attorney who practices in Queens. I am not aware if she is
7 admitted to practice in the Southern District, but I have kept
8 her fully abreast of all of these decisions.

9 THE COURT: Did you talk to her?

10 MR. CHARNEY: I have seen her in the in the Family
11 Court. I participated in a mediation with her in November on
12 this case.

13 THE COURT: Did she speak to her socalled clients?

14 MR. CHARNEY: I would have to idea. I want to point
15 something else out also: She was only assigned to this case in
16 June, I believe. Prior to that, Ms. Moser's office actually
17 represented Erica and Bryanna as well and I believe at the end
18 of May, at that time before they had to withdraw.

19 THE COURT: Is there anybody in this courtroom among
20 all these lawyers who has ever talked to these kids?

21 MR. CHARNEY: No, your Honor, only the Riveras who are
22 not lawyers.

23 THE COURT: Ms. Moser, have you talked to them?

24 MS. MOSER: I am sorry, your Honor, I have not.

25 MR. CHARNEY: I was going to say, your Honor, that in

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1 May the Legal Aid Society, which at the time was representing
2 Erica and Bryanna, did draft although they did not file a
3 motion with the Family Court that Erica and Bryanna be returned
4 as well, again that is in May, so I can't speak for what the
5 situation is now. But at that time their attorneys in the
6 Family Court supported them being returned to the Riveras, so
7 it seems to me your Honor pointed out that we don't have any
8 new information that would suggest the Riveras are incapable of
9 taking care of these children; and if in May their attorneys
10 were supporting returning them, it seems to me that I am not
11 understanding why today they would not be supporting returning
12 them.

13 THE COURT: I don't know. I am obviously faced with a
14 great deal of formality, which is unusual, and it apparently it
15 prevents the usual rapport that a lawyer has with his client,
16 and there are probably a lot of reasons for that, and I don't
17 want to initiate some process that has a committee going out
18 and visiting these children.

19 MR. CHARNEY: I understand, your Honor.

20 THE COURT: I have no doubt about the good faith and
21 honesty of all the lawyers here, but somebody, it seems to me,
22 has got to go speak to these children. I don't want them
23 brought into court. I don't think that is a good idea.

24 MR. LEVINE: Your Honor, may I be heard?

25 THE COURT: Yes.

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1 MR. LEVINE: I had reported at the September 14
2 hearing that I spoke with Ms. Marshall, and she opposed the
3 return.

4 THE COURT: Who is Ms. Marshall?

5 MR. LEVINE: The law guardian for Erica and Bryanna,
6 and she was against the return of the children.

7 THE COURT: All three?

8 MR. LEVINE: Erica and Bryanna, her clients.

9 THE COURT: What did she say?

10 MR. LEVINE: That they didn't want to go back, and she
11 didn't want them to go back. That is what she told me. That
12 was after May, that was in September. And in October, the
13 birth mothers, Ramona and Latoya, filed an affidavit in
14 opposition to the proposed intervention because the birth
15 mother doesn't want her children going back. The birth mother
16 has a permanency plan where the children will come back to her,
17 and I can't speak for why she doesn't want them to go back to
18 the Riveras. It would seem to me that this concept of family
19 unity would be harmed if the birth mother doesn't want the
20 return of the children, and the Riveras insist over her
21 objection getting them back.

22 MR. CHARNEY: Your Honor, I'd like to point out that
23 since Mr. Levine said what he said in September, I have spoken
24 to Ms. Marshall, and that would have been in November, and at
25 that point she said that the children informed her this did

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1 want to go back. She did not take a position one way or other.
2 She wanted to look into the issue further, which seems like a
3 very reasonable --

4 THE COURT: Should she have been here today?

5 MR. CHARNEY: She should have, your Honor. I have
6 invited her to every hearing, and I don't know if that's is not
7 like her practice, if she has too big a case load. There is
8 nothing excluding her from the process despite what the city
9 appears to be saying. I have invited her to every proceeding.
10 The Bell goes her encouraged her, provided her with papers and
11 she does nothing, and so I don't know what else the plaintiffs
12 can do to facilitate her attention.

13 THE COURT: The situation as far as your representing
14 Erica and Bryanna and Ms. Marshall, whatever she has to do with
15 Erica and Bryanna.

16 MR. CHARNEY: She is their law guardian in the Family
17 Court. The children involved in a child neglect proceeding,
18 her mother charged with child neglect. I believe it's now
19 serve or eight years ago, so whenever there is a Family Court
20 proceeding concerning Erica and Bryanna, Ms. Marshall
21 represents them in that procedure. This is a federal lawsuit
22 involving constitutional violations. She has not participated
23 in it, she is not asked to participate in it. I have invited
24 her to participate in it, but she has thus far not decided or
25 refused to. In the Family Court, again, the Riveras

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1 are not --

2 THE COURT: Is she representing just Erica and Bryanna
3 in the Family Court?

4 MR. CHARNEY: Yes, your Honor.

5 THE COURT: I don't see how I can do anything about
6 Erica and Bryanna until I get more information.

7 MR. CHARNEY: I agree, your Honor.

8 THE COURT: But it seems to me, and I don't say that
9 the record is ideal in the way sometimes we view evidence and
10 basis of findings and so forth, but it does seem to me that
11 there is reliable information to indicate that Jada would be
12 happy to go back to the Riveras. Nobody brings up any
13 suggestion otherwise, and if I direct that that is to be done,
14 who will do that and how will it be done?

15 MS. MOSER: Your Honor, I think typically what would
16 happen is that the order would be communicated to the foster
17 care agency, Family Court Systems Unlimited, which is the
18 contract agency with ACS, and they would make arrangements for
19 Jada to be brought to the foster care agency. She would
20 probably undergo a brief medical hearing before the transfer,
21 and then she would be transferred to -- the Riveras would come
22 to the foster agency to pick her up.

23 MR. CHARNEY: Your Honor, they have no problem doing
24 this. In fact in August when we originally thought -- the
25 Riveras have no problem coming to pick Jada up at offices of

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1 Family Support. They attempted to do that one other time in
2 August, which is what led to this lawsuit. All three of the
3 girls were brought to the agency with their suitcases, the
4 Riveras were told to come pick them up. They came to pick them
5 up, and they were told when they arrived that ACS had
6 essentially overruled the contract agency and said, "You are
7 not taking them today," so --

8 THE COURT: Let me put a ruling on the record.

9 I do not intend in this ruling to recapitulate the
10 entire train of facts involved in this case. I am going to
11 concentrate on the present issue. I think the record amply
12 shows the background, and I will not attempt to review that.

13 The issue now is whether in the present posture, which
14 has been reviewed thoroughly in the earlier part of this
15 hearing, whether in the present posture it is appropriate for
16 this court to order the return of Jada to the foster parents,
17 the Riveras. The record shows the relationship of the Riveras
18 Jada, and all of that, and again, I am not going to review all
19 of that. I am speaking right now of Jada, and I will not speak
20 for the moment of Erica and Bryanna.

21 As I said a few minutes ago, and this is reflected in
22 an earlier transcript, I refused at an earlier juncture a
23 motion to have Jada immediately transferred back to the Riveras
24 or returned to the Riveras, and I did so because of the reasons
25 reflected at that time on the record, and there was a hearing

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1 or September 14 of this year.

2 Factual issues existed, factual issues dealing with
3 possible sexual misconduct in the Rivera home which could
4 affect Jada and the other two young girls. The Riveras
5 themselves played no part in that problem at all except in
6 their home or part of their home where an adult child lived.
7 There was in my view an issue about whether there was some
8 threat of sexual misconduct affecting Jada and the other two
9 girls.

10 I held that as far as I could see from the record, the
11 removal of Jada and the other two girls -- I will speak of the
12 other two girls in context because I can't separate them -- but
13 the removal of Jada and the other two girls was justified in
14 order to resolve certain factual issues; and that is exactly
15 the way I put it, and I felt at that time that the city was
16 taking steps to determine the facts.

17 By the time of the September 14 hearing, the issue
18 raised by some report of actual sexual intercourse with one of
19 the older people in the home that accusation had been
20 withdrawn. There was still a issue, as I said, about whether
21 there was some possible threat of sexual activity with the
22 young girls.

23 Now, due process required resolution of those factual
24 issues, and due process required a determination, a reasonable
25 determination as to whether, first, the original removal was

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1 justified, and second, whether the removal should be continued.

2 Many months have gone by since the removal of March
3 31, and two months have gone by since the hearing of September
4 14. The city has made its investigation, and the result of
5 that investigation is that the Riveras were exonerated as far
6 as the situation which existed at the time of the removal. The
7 state has had a hearing, and although the final decision is not
8 here, the attorney for the state has stated that the finding is
9 that the removal was arbitrary and capricious.

10 The state has requested the city to make a further
11 investigation within 60 days as to what should be done
12 currently in view of the fact that all these months have gone
13 by since the removal on March 31. There has been discussion of
14 a possible renewal of some attempt to get the Family Court
15 involved in the issue of the proper foster care.

16 So what we have is a record which shows conclusions
17 reached both by the city and the state that the original
18 removal was improper. That means that there was certainly
19 process within the city and state in attempting to determine
20 what conclusion should be drawn about the original removal.
21 The problem about due process that remains is that a great deal
22 of time has gone by, and there is as yet no resolution by the
23 city, which has the authority, that is, there has been no
24 resolution by the city as to whether the removal should
25 continue, and as to what should be done currently, and it is

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1 the city which has the responsibility to make that
2 determination and not the state.

3 There surely is an issue as to whether this court
4 should act in advance of the city completing its investigation
5 and coming up with its own findings and conclusions about what
6 should be done under the current circumstances, but what I have
7 concluded is that due process required resolution much earlier
8 than now, and surely much earlier than 60 days from now as to
9 whether the removal was proper and as to whether the removal
10 should continue. It appears that there was an agreement
11 reached to return the children in August, although I am not
12 clear at the present moment exactly --

13 MR. CHARNEY: May I interrupt for a second, your
14 Honor? There is a letter, I believe it's plaintiff's Exhibit
15 2, from the attorney for the foster care agency stating on
16 August 20 that the children would be returned on August 25.
17 That's in the record.

18 THE COURT: That confirms what I was stating.

19 MR. CHARNEY: I am sorry.

20 THE COURT: And for reasons that are not at all clear,
21 that agreement was not carried out, but even August was a long
22 time after the removal in March. The passage of time may be
23 necessary, but the passage of time is also detrimental, and it
24 is my conclusion that there has been a violation of due process
25 rights in not resolving what needs to be resolved by now. I

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1 have heard, of course, that adjournments of the fair hearing
2 have been for various reasons. Of course, there are always
3 reasons why things are delayed and adjourned. The city had the
4 opportunity and the responsibility, despite everything that has
5 been said about adjournments and so forth, to resolve this
6 matter long ago rather than having it still dangling unresolved
7 today.

8 The record before me indicates that the issues that
9 were relied upon to remove the children have been completely
10 resolved. The record indicates that there is no threat, no
11 circumstance involving the kind of possibility of sexual
12 intrusion on these girls. All of that has been resolved and
13 the record indicates that the Riveras have taken steps to
14 remedy that situation completely. There is no suggestion of
15 any other reason whatever justifying the removal from the
16 Riveras. Consequently, I am ordering that Jada be returned to
17 the Riveras forthwith.

18 The findings that I have made, despite some
19 introductory remarks of mine, the findings apply also to Erica
20 and Bryanna. However, I am not ready to enter any order about
21 Erica and Bryanna because there must be some communication with
22 them and return communication to me about their desires. I am
23 confident that what has been told to me about Jada's desires
24 are reliable, and I am informed reliably that Jada wishes to
25 return to the Riveras. I have no such information about Erica

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1 and Bryanna. As soon as there is information available, I will
2 convene a hearing and we can take care of that matter.

3 As far as Jada is concerned, Jada is represented in
4 this case by Mr. Charney and Mrs. Kubitshek --

5 MR. CHARNEY: No, your Honor, Jada is represented by
6 Ms. Moser.

7 THE COURT: I am sorry, Jada is represented by
8 Mrs. Moser. I have got to ask you, Ms. Moser, to follow this,
9 and somehow if Jada indicates in this process something
10 different from what I believe to be true, you have got to
11 inform the court.

12 MS. MOSER: Yes, Judge.

13 THE COURT: And I don't know the mechanics, I don't
14 know what will happen exactly, but if you are representing her,
15 you have got to somehow see her and know what is going on with
16 her. That concludes our hearing today.

17 MR. LEVINE: Your Honor, may I ask a question and make
18 a request?

19 THE COURT: Sure.

20 MR. LEVINE: The question is whether your preliminary
21 injunction is intended to stay the city from proceeding with
22 compliance with the fair hearing decision, and my request is
23 for a 10-day stay of the effectiveness of the order so that if
24 we are so inclined to appeal and seek a stay from the circuit,
25 we can do so. As your Honor indicated, this implicates the

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1 courts, our jurisdictional issues, and federal-state comity
2 with respect to court proceedings.

3 THE COURT: Look, the city can go ahead with whatever
4 investigation it wishes to pursue. As far as any stay, I am
5 granting no stay whatever. As far as I am concerned, the
6 problem with this case has been endless delays, and as far as
7 this court is concerned I am not going to contribute to any
8 further delay.

9 MR. CHARNEY: Your Honor, may I ask one question? You
10 pointed out with respect to Erica and Bryanna you would like to
11 have more information about what their wishes are. I mentioned
12 earlier that my office has not been permitted to have any
13 contact with them. I would ask that we have had a social
14 worker -- there is one in our office, she has forty years of
15 experience in child welfare. I could submit her resume for
16 your consideration. But I would ask that you order the city to
17 permit my social worker, not me, not any attorneys, but my
18 social worker to meet with Erica and Bryanna and find out
19 exactly what they want, because I am in the dark because I have
20 not been allowed to speak to them and --

21 MR. LEVINE: Mr. Charney does not represent them.

22 MR. CHARNEY: In the federal case we do. I am not
23 talking about Family Court. I am talking about the federal
24 proceedings. In Family Court the issue about --

25 THE COURT: You have got to, either personally or

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1 through a representative you have got to talk to your client.

2 MR. CHARNEY: That is what I am asking, your Honor.

3 THE COURT: Of course. I will sign any authority you
4 need that is reasonable.

5 I want to say about Jada, I have entered an order
6 which is appealable, there is no doubt about it, but there is
7 no issue about jurisdiction or standing. The Riveras are
8 family members, they have rights. That's really been resolved
9 long since.

10 I would only hope that as to Jada we just get that
11 over with. She should be returned to the Riveras, and if the
12 city has any common sense at all, that will be done, there will
13 be no further objection.

14 As far as Erica and Bryanna, of course there is an
15 issue, I believe, about their desires, but at this point if we
16 have -- these are not girls in a crib, they are old enough to
17 know what they want to do, and if it is true that Jada wants to
18 go back to Riveras, there is no earthly reason on this record
19 that this should not be done; and as far as I am concerned at
20 this point it's really what Erica and Bryanna want to do, and
21 that should be determined.

22 The city is faced with a finding by the state that the
23 original removal was arbitrary and capricious, so to talk about
24 an appeal, of course you have a right to appeal, but it's not
25 sensible. This case ought to be wound up. Jada should be

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1 returned unless she somehow indicates in the course of it that
2 she doesn't want to be. Erica and Bryanna should be treated in
3 the way they wish to be treated, and that should be the end of
4 it if the parties have any sense of things at all. Thank you.

5 MR. LEVINE: Thank you, your Honor.

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Hearing

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 MABEL and ANTHONY RIVERA,

5 Plaintiffs,

New York, N.Y.

6 v.

06 R. 7077 (TPG)

7 MATTINGLY, et al., etc.,

8 Defendants.

9 Before:

December 20, 2006
4:15 p.m.

10 HON. THOMAS P. GRIESA,

11 District Judge

12 APPEARANCES

13 LANSNER & KUBITSCHKE

14 Attorneys for Mabel and Anthony Rivea,
DARIUS CHARNEY,

15 THERESA B. MOSER,

Attorney for Plaintiff J.C.

16 LAW DEPARTMENT, CITY OF NEW YORK,

17 Attorneys for New York City Defendants,
JESSE I. LEVINE,
18 of Counsel.

19 ATTORNEY GENERAL, STATE OF NEW YORK,

20 Attorney for New York State Defendants,
ROBERT KRAFT,
21 of Counsel.

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Hearing

1 (In open court; case called)

2 THE COURT: I have now received some materials in
3 response to the questions I left opened and they're helpful so
4 what -- before you get to what you, I'm sure you want to say,
5 just review again the procedural posture.

6 My memory is that the state held a fair hearing and
7 Mr. Kraft reported that there was a draft, now there's a
8 decision. I think the fair hearing -- I don't think this is
9 quoted but he said that the removal was improper.

10 MR. CHARNEY: Yes, your Honor, I actually have a copy
11 of the decision. It was issued on December 13. I believe the
12 parties have it, seen it. I can provide a copy to the court.

13 THE COURT: Please, of course.

14 MR. CHARNEY: I'll paraphrase. Obviously, you can
15 read it yourself. It's my understanding from reading it that
16 the state found that the removal of the girls was arbitrary and
17 capricious and abuse of the discretion by ACS and the foster
18 care agency. However, the state did not order the girls
19 returned. It ordered ACS and the foster care agency to do a
20 new evaluation of the current circumstances. It gave them 60
21 days to do that. And at that point, according to Mr. Kraft, he
22 submitted a letter to your Honor, I believe, on yesterday which
23 basically says that once ACS and the agency make that
24 determination, that's the end of the matter. So, in other
25 words, the Riveras would at that point not have any further

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Hearing

1 ability to contest what ACS and the agency find.

2 Last week your Honor ruled that -- and also not only
3 last week but in a prior case involving an identical situation,
4 that this way of handling a fair hearing by the state is not
5 due process because effectively the Riveras have not received
6 any remedy. They were seeking the return of the girls. They
7 did the entire fair hearing, were victorious on the merits, but
8 yet did not get the relief that they were seeking.

9 The only reason they did the fair hearing was to get
10 the children back. Mr. Kraft seems to believe -- and it's his
11 client, the state, Office of Children and Family Services,
12 seems to believe that the purpose of the fair hearing is not to
13 provide a way for a kinship foster parent to get the kinship
14 foster child back. He feels that the only decision the fair
15 hearing judge can make is whether or not the removal was
16 incorrect. It's then left up to ACS whether the child should
17 be returned.

18 Your Honor found in the Haines v. Mattingly case that
19 that was not adequate due process, and I believe your Honor
20 found last week that that was not adequate due process.

21 Your Honor then ordered last Monday that one of the
22 three children should be returned immediately, J.C.. She was
23 returned to Ms. Rivera on Tuesday, December 12. You also
24 signed an order that I submitted which gave my social worker
25 from my office, Barbara Winter, who is sitting in the front

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Hearing

1 row, the opportunity to meet with E.S. and B.C. outside the
2 presence of any attorneys or any of the parties to find out
3 what they wanted to do.

4 Your Honor did not rule on E.S. and B.C. last week
5 because your Honor wanted to find out, rightfully so, what the
6 girls themselves wanted.

7 Ms. Winter is here today. I believe you have a
8 declaration from her which was filed last night.

9 Ms. Winter is willing to either sit at counsel table
10 and give a report to you, or if you would like for her to take
11 the stand and answer questions, we could do it either way, if
12 your Honor is so inclined.

13 We believe that -- Mr. Winter met with each of the
14 girls independently yesterday. She then observed a visit
15 between E.S. and B.C. and Ms. Rivera and J.C., and I believe
16 she discusses it in her declaration.

17 THE COURT: J.C. has gone back to the Riveras?

18 MR. CHARNEY: Yes. She's been back now for a week.

19 THE COURT: Good. So Mrs. Rivera and J.C. came?

20 MR. CHARNEY: The meeting was at the foster care
21 agency because that is where visits are supposed to take place.
22 We did not feel it was appropriate to ask to have the meeting
23 at my law office because we wanted to make this as normal as
24 possible for the girls, to the extent it is normal. But the
25 agency is where they visit with relatives. So we felt that if

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1 the meeting and the visit took place there, that would be the
2 easiest for the girls. So that's where it took place on Monday
3 afternoon.

4
5 THE COURT: And at some point Mrs. Rivera and J.C.
6 came?

7 MR. CHARNEY: Yes. They did come. They asked the
8 agency whether or not they were permitted to visit. The
9 agency, family support systems, again, this was their office,
10 did permit a visit to take place at the agency's office.
11 Ms. Rivera was not allowed to take the girls outside of the
12 office.

13 The visit lasted from about 4:45 to 5:45. Ms. Winter,
14 the social worker in my office, observed the visit from
15 approximately I think it was about 4:50 to 5:30, so for about
16 40 minutes she observed, did not -- you know, intercede in any
17 way. She just observed the girls' interactions with
18 Mrs. Rivera and J.C. and then she put her observations in a
19 declaration. She's also here to answer any questions you may
20 have or to clarify anything for your Honor.

21 I also want to mention, I attached the resume of
22 Ms. Winter. She has been working in the field of child welfare
23 now for -- I don't want to give away her age, but for about
24 four decades. She's testified as an expert witness in several
25 family court proceedings, including child abuse and neglect

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1 proceedings. She works with children and families in foster
2 care, so this is really her area of expertise. And I felt that
3 she was a lot more qualified to speak to the girls than I as a
4 lawyer would be. So that was the reason that we ask that she
5 be allowed to meet with them.

6 THE COURT: So I assume you wish to now have the same
7 direction entered as far as E.S. and B.C. as I did with J.C.

8 MR. CHARNEY: Yes, your Honor.

9 THE COURT: Okay. Mr. Levine.

10 MR. LEVINE: Yes, your Honor. First, with respect to
11 certain statements Mr. Charney said. Mr. Kraft's letter did
12 not say that upon remand that was the end of the matter.

13 What Mr. Kraft's letter said was that after the
14 remand, whatever the city determined was final because it was
15 not subject to further administrative review, and that can be
16 challenged in the New York State Supreme Court.

17 Secondly, your Honor, we have moved for
18 reconsideration of the availability of this kind of hearing in
19 the family court. That motion was returnable today. I don't
20 know the results of that motion.

21 MR. CHARNEY: Your Honor, I can speak to that if you'd
22 like me to. I was there, but I'll let him finish.

23 MR. LEVINE: With respect to this report, your Honor,
24 your Honor's order specifically said that the interview is to
25 be outside the presence of the plaintiffs, defendants, FSSU,

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1 and ACS, and yet the most important finding, according to
2 Ms. Winter's declaration, was the interaction between the
3 children and Mrs. Rivera, which was clearly prohibited by your
4 order.

5 More importantly, your Honor --

6 THE COURT: What did I prohibit?

7 MR. LEVINE: That the interview be held outside -- you
8 prohibited the interview from being held in the presence of any
9 of the parties, in the second paragraph of your order of
10 December 15, your Honor. And yet the most important finding
11 that Ms. Winter made was based on the interaction between the
12 children and Ms. Rivera.

13 THE COURT: Certainly, she interviewed both E.S. and
14 B.C. by herself and then the others came, and I would think
15 it's extremely helpful what happened, extremely helpful.

16 MR. LEVINE: The law guardian for the children in this
17 case, Kristine Marshall, has submitted a declaration. She also
18 interviewed one of the children yesterday. She found her, and
19 she had found her and her sister previously conflicted about
20 where they wanted to reside temporarily. They both --

21 THE COURT: Did Ms. Marshall go see --

22 MR. LEVINE: Yes. She saw E.S. yesterday.

23 THE COURT: Did she see B.C.?

24 MR. LEVINE: No.

25 THE COURT: Why not?

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1 MR. LEVINE: She was not able to see her. They were
2 not able to get her there in time.

3 And the law guardian said in her view there are
4 questions about the home, the children are conflicted, and that
5 there should be no return until there has been an independent
6 forensic examination.

7 THE COURT: Look, what you're proposing is to go on
8 and on and on with no resolution. That is the problem I had
9 last week. It's the problem I still have.

10 I said when I originally denied relief that there were
11 factual issues to be resolved. Of course there were. But that
12 means resolving them. The removal took place -- wasn't it last
13 March?

14 MR. CHARNEY: Yes, your Honor.

15 THE COURT: My finding last week, and it is my finding
16 today, that there is a violation of due process because there
17 is no mechanism created by the city or the state to
18 administratively resolve the factual issues that need to be
19 resolved. Of course, one initial problem or issue was whether
20 the removal was proper. It seems to me that the fair hearing
21 decision resolves that administratively to the effect that the
22 removal was improper.

23 Now, one could argue that that's sufficient. If the
24 removal was improper, the girls should go back. I don't take
25 that view. I feel that once -- even though the removal was

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1 improper, the authorities have a right to consider what remedy
2 is appropriate. And it is conceivable that even though a
3 removal is improper, it is conceivable that the proper remedy
4 may not be the return of the child to the foster parent.
5 That's debateable whether that's a proper issue, but I believe
6 it is.

7 But surely where there is an improper removal, any
8 questions about the proper remedy should be administratively
9 resolved in something less than three-quarters of a year. And
10 in my view it's a violation of due process to hold out the idea
11 that there should be further investigation as of this time that
12 can take as much as 60 more days or that there is a possibility
13 that the family court may provide some remedy, and I'll hear
14 about that.

15 But my problem is as of this time, December 20, 2006,
16 there is still no administrative determination of the issues
17 about the proper remedy, the proper placement, something that
18 should have been resolved, in my view, months and months ago.
19 I know there have been excuses of one kind or another. None of
20 those excuses are satisfactory in my view.

21 Now, what has happened in the family court?
22 Mr. Charney said that he has some report on that.

23 MR. CHARNEY: Yes. As Mr. Levine stated, the city
24 brought a motion to reconsider the family court's denial of Mr.
25 and Mrs. Rivera's motion -- Mr. and Mrs. Rivera brought a

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1 motion in the family court in September to get a hearing on
2 whether or not the girls should be returned to them. The
3 family court ruled on November 29 -- I believe you have that
4 decision. It's exhibit 9 to the plaintiffs' papers.

5 THE COURT: Ruled when?

6 MR. CHARNEY: November 29, so very recently, ruled
7 that the Riveras did not have a right to such a hearing in the
8 family court, that the only remedy was the administrative
9 remedy that we've heard so much about, the fair hearing, the
10 independent review, and that that was their only recourse.

11 ACS, I believe it was last week -- I think it was last
12 week brought an order to show cause in the family court to get
13 a hearing on their motion to reconsider that decision. In
14 other words, they wanted the family court to reverse itself and
15 allow for such a hearing. Today was the return date on that
16 order to show cause in the family court. I was present, as was
17 an attorney for the city's Administration for Children's
18 Services, Ms. Marshall, the law guardian for E.S. and B.C., and
19 the attorney for E.S. and B.C.'s mother.

20 The family court did not grant the motion to
21 reconsider today. It did not actually decide it one way or the
22 other.

23 What the judge did say, because I informed the judge
24 that we had this hearing today, was that she believed that it
25 was possible that the case could be resolved in federal court

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1 as soon as this afternoon and that in that case the motion
2 would become moot.

3 She gave ACS until January 9 of '07 to provide her
4 with caselaw to convince her that she should have such a
5 hearing. At this point she does not believe that under New
6 York State law Mr. and Mrs. Rivera are entitled to this
7 hearing. So, on January 9 if ACS is able to provide her with
8 cases she may -- there is no guarantee -- grant the hearing;
9 again, just a hearing, not resolving the issue.

10 She also said -- and I think your Honor has this in
11 that decision on November 29, she quoted your decision from the
12 Haines case, which basically said that there has to be a trial
13 in these constitutional violations and it should be in federal
14 court because this is a constitutional problem and that's
15 obviously within your jurisdiction.

16 You have found that there is a violation of due
17 process. It's, obviously, the federal court's province to
18 remedy any constitutional violation. And the family court
19 judge did not say today that she was in any way irritated or
20 offended by having the federal court resolve what is clearly a
21 constitutional problem.

22 If the federal court does not resolve it, then she
23 will entertain ACS's application for hearing, which she has
24 already denied when the Riveras made it. It doesn't mean she's
25 going to hold such a hearing. She's going to listen to whether

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1 or not there's any law to support the Riveras' right to a
2 hearing.

3 I mentioned last time we were before you that I think
4 as a matter of state law the family court is absolutely
5 correct. That's why we had to bring this federal lawsuit.
6 Because under New York State law there is no right for the
7 Riveras --

8 THE COURT: It's inconclusive in the family court.

9 MR. CHARNEY: Exactly.

10 THE COURT: Is Ms. Marshall here?

11 MR. CHARNEY: No.

12 MR. LEVINE: No, she's not, your Honor.

13 THE COURT: I'd like to take some testimony or allow
14 some testimony of the social worker.

15 MR. CHARNEY: Okay. Would you like me to call --

16 THE COURT: I read the declaration of Kristine
17 Marshall. It simply raises some questions. It is inconclusive
18 and suggests that there should be further investigation.

19 I find that it is difficult to believe that we have to
20 continue having one investigation after the other and not come
21 to some resolution. I really cannot give weight to the
22 declaration of Kristine Marshall.

23 Now, I would like to have Ms. Winter take the stand.

24 Barbara Winter,

25 called as a witness by the Court,

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1 having been duly sworn, testified as follows:

2 THE COURT: Any attorney can conduct examination, but
3 I think we all know what's in the declaration.

4 What I would like to ask you, you interviewed, did you
5 not, E.S. and B.C.?

6 THE WITNESS: Correct. Yes, I did.

7 THE COURT: Did you interview E.S. by herself?

8 THE WITNESS: Yes, I was with E.S. alone for
9 approximately 20 minutes. She arrived first. And B.C. did not
10 arrive until at least a half-hour, 30 minutes later.

11 THE COURT: Where was this interview?

12 THE WITNESS: It was in a conference room in the
13 agency but nobody else -- with E.S. nobody else was there.

14 THE COURT: What agency is that?

15 THE WITNESS: Family Support Systems, a foster care
16 agency.

17 THE COURT: What was the substance of that interview
18 with E.S.?

19 THE WITNESS: I explained to E.S. as I understood what
20 my role was here, that I was asked to come and talk to the
21 children because you wanted to know, your Honor wanted to know
22 what the children wanted to do about where they lived. And I
23 told them that the reason J.C. had gone home was because her
24 law guardian knew what she wanted, what J.C. wanted, and
25 presented that in court, but that the court didn't know what

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1 E.S. and B.C. wanted.

2 THE COURT: Refresh my memory. How old is E.S.?

3 THE WITNESS: E.S. will be 9 next month.

4 THE COURT: Did she appear to understand that
5 explanation?

6 THE WITNESS: Yes. I thought she did.

7 THE COURT: Go ahead. What happened?

8 THE WITNESS: Well she said to me -- I actually asked
9 her, because sometimes children are very shy, whether she
10 wanted to wait for B.C. And she said no. And she said that
11 she wanted to go back to Ms. Rivera -- she calls her Aunt
12 Mabel. And I did ask them -- it's not in my statement. But I
13 did ask them if they wanted to be home before Christmas. And
14 she said that she did.

15 THE COURT: Now, did she make any comment about her
16 present -- she's in another foster home, right?

17 THE WITNESS: Yes. She's in a foster home, correct.

18 THE COURT: Did she make any comment about the current
19 foster home?

20 THE WITNESS: No. She was not complaining about it.
21 She did not make any comments about it.

22 She told me a little bit about school and that she'd
23 have to change back, but she didn't --

24 THE COURT: Did she change -- when she was removed
25 from the Riveras last spring, did that involve a change of

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1 school?

2 THE WITNESS: Oh, yes, for all three children.

3 THE COURT: Did she say anything about the school
4 situation?

5 THE WITNESS: No. She didn't. She knew which school
6 she'd go back to because it was the one she had come from, but
7 she wasn't expressing any opinion about either school.

8 THE COURT: Okay. She didn't say she liked one versus
9 the other? She just --

10 THE WITNESS: No, she didn't.

11 THE COURT: Did she appear to be -- I guess we could
12 find out but in other words -- but she did not appear to object
13 to going back to the school?

14 THE WITNESS: No, no she didn't.

15 THE COURT: Now, what about B.C.? Did you talk to
16 B.C. by herself?

17 THE WITNESS: By the time B.C. came -- Ms. Rivera and
18 J.C. had arrived prior to B.C. and J.C. -- E.S. just ran down
19 the hall to hug J.C. and then they both came in to the
20 conference room. They were sitting and talking at one end of
21 the table while I was talking to B.C. at the other end of the
22 table. But they were very much caught up in what they were
23 doing. They had no interest in what I was talking with B.C.
24 about.

25 THE COURT: You mean E.S.?

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1 THE WITNESS: And J.C., correct.

2 THE COURT: They appeared to be friendly?

3 THE WITNESS: They're very friendly. They're like
4 sisters. They were very close. Really E.S. just ran down the
5 hall and grabbed J.C., and then ran out to the waiting room and
6 saw Ms. Rivera and hugged her.

7 THE COURT: Did she appear to be affectionate toward
8 Ms. Rivera -- we're talking about E.S. now.

9 THE WITNESS: Correct.

10 THE COURT: Did she appear to be affectionate towards
11 Ms. Rivera?

12 THE WITNESS: Yes, she did. She ran over and hugged
13 her.

14 THE COURT: Tell me about your talk with B.C..

15 THE WITNESS: B.C. and I sat at the opposite end of a
16 conference table that had to be, I would say four or five feet
17 long. J.C. and E.S. were talking and B.C. and I were talking.

18 B.C. also very quickly said -- I explained the same
19 thing to her and she --

20 THE COURT: Did she appear to understand it?

21 THE WITNESS: I believe so, your Honor. She was a
22 little slow, but I think that she did. And she said she wanted
23 to go back to Ms. Rivera. But I want to say what I noticed was
24 after I asked them to let Ms. Rivera come in the visit -- she
25 has not seen these children since they were removed -- B.C.

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1 just stayed with Ms. Rivera. She was very attached to her.
2 She'd come over, hug her, walk away, come back, but she seemed
3 very attached to Ms. Rivera.

4 THE COURT: But during the time that you talked to --
5 during the time you talked to B.C., I think you said that J.C.
6 and E.S. were at the other end of the table?

7 THE WITNESS: Correct.

8 THE COURT: Where was Ms. Rivera?

9 THE WITNESS: Ms. Rivera was still in the waiting
10 room. It was still an interview --

11 THE COURT: She wasn't in this room?

12 THE WITNESS: Oh, no. It was still my interview, not
13 a visit. And then I -- after I spoke to --

14 THE COURT: So B.C., have you said everything that
15 went on with B.C.?

16 THE WITNESS: Yes.

17 THE COURT: And then what about, did Ms. Rivera come
18 in or did they go to see Ms. Rivera? What happened?

19 THE WITNESS: No. I asked -- I watched the kids
20 together for maybe ten minutes and then I asked if Ms. Rivera
21 could join the children. And one of the workers got her from
22 the waiting room, brought her to the conference room.

23 THE COURT: Got Ms. Rivera?

24 THE WITNESS: Correct. So then I believe they visited
25 for about 25 minutes. I left early. The agency said they

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1 could continue their visit. But I didn't really need to be
2 there at that point.

3 THE COURT: How did -- I think you said, but how did
4 the children greet Ms. Rivera?

5 THE WITNESS: They were both very happy to see her.
6 As I said, B.C. was very bonded to her. E.S. and J.C. were
7 very close with each other. E.S. is more mature than B.C..
8 B.C. is slow. But she -- E.S. was quite independent and
9 interacting with J.C., but nobody seemed to be afraid of
10 Ms. Rivera or unhappy to see her. E.S. was just delighted to
11 see J.C. and I think the fact that J.C. has gone back to her
12 old school, very -- makes it much easier for E.S., they're in
13 the same school, or were until --

14 THE COURT: Does any lawyer want to ask questions?

15 MR. LEVINE: Yes, your Honor.

16 THE COURT: Okay.

17 BY MR. LEVINE:

18 Q. Ms. Winter, do you know how it happened to be that
19 Ms. Rivera and J.C. were at FSSU?

20 A. Yes. We asked them to come.

21 Q. Who asked them to come?

22 A. My office did. Ms. Rivera, actually, and the children are
23 our clients, and we did ask her to come.

24 Q. Were you aware that the order permitting your discussion
25 with the children was to be outside the presence of the other

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1 plaintiffs?

2 A. I interviewed E.S. alone. I interviewed B.C. with the
3 other children there but in a separate corner, but Ms. Rivera
4 was not there at any time when I spoke with the children nor
5 was the agency worker who asked if she was supposed to sit in
6 and I said I didn't think so.

7 Q. Did you -- I believe in your declaration you indicated that
8 you thought observing the interaction of E.S. and B.C. with
9 J.C. and Ms. Rivera was an important part of your determining
10 that it was in their best interests to go back to Ms. Rivera's
11 home; is that right?

12 A. I thought observing the interaction was extremely helpful.
13 Otherwise because talking to the children is sort of in a
14 vacuum. To observe them together adds a lot.

15 Q. Did you observe either of the children in the presence of
16 their current foster mother?

17 A. No, not really. The current foster mother simply brought
18 B.C. to the conference room and then left. So I really didn't
19 know.

20 Q. What questions did you ask the children about their current
21 foster home?

22 A. I asked E.S. what it was like, whether it was an apartment
23 or a house, what the school was like, what she liked best in
24 school.

25 She said she liked math. So she and I began to do

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1 math puzzles or whatever. And she was very happy with that.

2 Math problems. Thank you.

3 Q. Did you ask them how they were treated by their current
4 foster mother?

5 A. No, I didn't.

6 Q. Was that of interest to you in determining where their best
7 interests lay?

8 A. My understanding was that I was to find out which they
9 preferred, to remain with the foster parent or to return to
10 their aunt.

11 Were I to try to determine best interests, I would
12 have had to do a lot more than just one interview.

13 Q. Well, did you think it was important to know how they
14 related to their current foster mother?

15 THE COURT: No. She was not -- she really did what
16 she was asked to do, find out the desire. She wasn't to
17 investigate; and she did, in my view, a splendid job of doing
18 what she was asked to do.

19 MR. LEVINE: Do you want me to terminate my
20 examination, your Honor?

21 THE COURT: No, I don't. But I don't --

22 Q. Do you think it was -- would have been appropriate to see
23 the children relating to their current foster mother?

24 MR. CHARNEY: I'm going to object, your Honor.

25 THE COURT: Sustained.

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1 Q. Did you have any discussion with the children as to whether
2 they knew they were -- the plan was for them to return to their
3 mother on a permanent basis?

4 A. No, I didn't. I didn't discuss that with them.

5 My understanding was that I was supposed to find out
6 whether they wanted to go with Ms. Rivera or stay where they
7 were, not whether the -- returning to their mother was a
8 choice.

9 Q. Well did they understand that going from one home to
10 another would be temporary?

11 A. You mean back to their aunt?

12 MR. LEVINE: Yes.

13 MR. CHARNEY: Your Honor, this line of questioning I
14 don't see the relevance.

15 THE COURT: Absolutely -- those children don't know
16 what's going to happen with the legal proceedings about the
17 birth mother. They don't know that.

18 MR. LEVINE: I believe, your Honor, in Ms. Winter's
19 declaration she stated that she told them that their Aunt Mabel
20 had sued to get them to come back with her.

21 THE WITNESS: Yes, I did.

22 MR. CHARNEY: She didn't sue to keep them from going
23 back to their mother. That's not what this lawsuit is about.

24 THE COURT: That's right. The issue about the birth
25 mother is a separate issue. And nothing that -- I would

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1 imagine the children are not acquainted with the legal
2 proceedings there and they have no -- all I can say is that
3 Ms. Winter did what she was asked to do and she wasn't asked to
4 go beyond that, find out their desires as far as the foster
5 care.

6 MR. LEVINE: Your Honor, I know that you haven't been
7 impressed with Ms. Marshall's declaration as law guardian, but
8 the comments she made is that these children are easily led and
9 that's why an independent examination was appropriate. And I
10 think that it's singularly inappropriate for the basis of the
11 decision to be made on the interaction with the plaintiffs who
12 are supposed to be excluded from the interview.

13 THE COURT: I disagree, I'm sorry to say, just
14 thoroughly disagree.

15 Let's conclude this. Thank you very much. You did a
16 fine job.

17 MR. LEVINE: Before your Honor rules may I make one
18 quick statement.

19 THE COURT: Sure.

20 MR. LEVINE: Just to -- for the record, we reiterate
21 or objections with respect to the subject matter jurisdiction
22 of the court in this kind of matter and also indicate that we
23 believe that your Honor's initial analysis of why there is a
24 liberty interest is to protect the family unit with respect to
25 kinship foster parents. And in this case, your Honor, I

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1 believe that is not the proper view because in effect this
2 court is interceding in a dispute between the birth mother and
3 the foster parents.

4 MR. CHARNEY: Note my objections to his arguments,
5 mischaracterization.

6 THE COURT: The response to that is that my -- the
7 issues before me are strictly related to foster care, and I
8 have nothing before me about the issue about whether the
9 children return to their birth mother or birth mothers. That
10 isn't before me and what course that takes in the agencies or
11 the courts that have jurisdiction, that's a matter completely
12 separate from what I'm dealing with.

13 The one remaining question which I left opened at the
14 last hearing has been resolved, and I find that there is very
15 clear evidence that B.C. and E.S. wish to return to the Rivera
16 household and to the foster care of -- is it the great aunt?

17 MR. CHARNEY: Yes, your Honor.

18 THE COURT: The great aunt Ms. Rivera. And nothing
19 has been shown anymore now than before as to any incapacity or
20 any misconduct on the part of Ms. Rivera that would render her
21 an improper foster parent. Consequently, I am directing that
22 E.S. and B.C. be returned to the Rivera household and the
23 findings and conclusions that I stated at our last hearing on
24 the legal issues apply, of course, to the situation about E.S.
25 and B.C. and that is my ruling.

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1 Thank you very much.

2 MR. CHARNEY: Your Honor, when should they be
3 returned?

4 THE COURT: As soon as possible.

5 MR. CHARNEY: Does that mean within 24 hours? J.C.
6 was returned within 24 hours.

7 THE COURT: J.C. was returned -- it seemed to me what
8 happened was that -- J.C.'s attorney was here and I think that
9 I asked that -- all I asked was that there be some appropriate
10 escort or something to make sure that J.C. was -- that things
11 went well with the transfer of J.C. and if a problem came up I
12 wanted to know about it. Now who -- somebody really will have
13 to do that kind of office with respect to E.S. and B.C.. And
14 if something comes up that there's an indication of a problem
15 and if it somehow conflicts with what Ms. Winter said, I want
16 to know about it.

17 MR. CHARNEY: Yes, your Honor. I guess my question is
18 at the last hearing you ordered that J.C. be returned
19 forthwith. Ms. Moser, who is J.C.'s attorney, and I'll let her
20 elaborate, but I believe she informed the court that the child
21 has to be medically cleared before she can be returned.

22 MS. MOSER: Your Honor, what I claimed on the last
23 court date was simply that typically what happens when a child
24 is moved from one home to another is that the child is brought
25 to the foster care agency by the foster parent, medically

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1 cleared at the foster care agency, and then the new parent who
2 is bringing the child home brings the child from the agency
3 home.

4 THE COURT: Whatever procedure is proper, just --
5 you're the attorney for E.S. and B.C..

6 MR. CHARNEY: Yes, in this case, yes.

7 THE COURT: So you need to watch over that process.

8 MR. CHARNEY: I was -- your Honor's decision last week
9 was very clear that it be done forthwith meaning as soon as
10 possible.

11 THE COURT: I intend to have it done forthwith.

12 MR. CHARNEY: Thank you, your Honor.

13 THE COURT: Thank you.

14 (Adjourned)

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